Supreme Court, U.S.
FILED

961589 APR 7 1997

OFFICE OF THE CLERK

No. 96-____

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1996

CARROLL W. COLFORD
Petitioner,

v.

CHUBB LIFE INSURANCE COMPANY OF AMERICA
Respondent.

On Petition For Writ of Certiorari To The Maine Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

RONALD D. MAINES
(*Counsel of Record*)
R. SHAWN GUNNARSON
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

67 pp

QUESTION PRESENTED

Whether, by resting its judgment on inadequate State grounds, the Maine supreme court improperly avoided the question of the constitutionality of a jury award of $24 million in punitive damages under the standard articulated by this Court in *BMW v. Gore*, 116 S.Ct. 1589 (1996).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

CONCLUSION 22

TABLE OF AUTHORITIES

CASES: Page

Barr v. City of Columbia, 378 U.S. 146 (1964) 12
BMW v. Gore, 116 S. Ct. 1589 (1996) ..... *passim*
Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U.S. 537 (1930) 13
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 11
Hathorn v. Lovorn, 457 U.S. 255 (1982) 12
Howlett v. Rose, 496 U.S. 356 (1990) 11
Gray v. State of Maine, 624 A.2d 479 (Me. 1993) 18
Gurski v. Culpovich, 540 A.2d 764 (Me. 1988) 15
James v. Kentucky, 466 U.S. 341 (1984) 12
Johnson v. Mississippi, 486 U.S. 578 (1988) 13
Latremore v. Latremore, 584 A.2d 626 (Me. 1990) 16
Loe v. Town of Thomaston, 600 A.2d 1090 (Me. 1991) ... 17
Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 13
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 13
Pelky v. City of Presque Isle, 685 A.2d 429 (Me. 1996) .. 17
Rogers v. Alabama, 192 U.S. 226 (1994) 13
Rubin v. Matthews International Corp., 503 A.2d 694 (Me. 1985) 15
Staples v. Bangor Hydro-Electric Co., 561 A.2d 499 (Me. 1989) 18
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 13
Terre Haute & Indianapolis R.R. Co. v. Indiana ex rel. Ketcham, 194 U.S. 579 (1904) 13
Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979) 15
Vogt v. Churchill, 679 A.2d 522 (Me. 1996) 16
Walston v. Monumental Life Ins. Co. 923 P.2d 456 (Id. 1996) 20

CONSTITUTIONAL & STATUTORY PROVISIONS:

U.S. Const. Art. VI 14
U.S. Const. amend. XIV, § 1 ..... *passim*
42 U.S.C. § 1983 12

OTHER SOURCES:

Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965) 13
Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court*, 34 WASH. & LEE L. REV. 1043 (1977) .. 11

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1996

CARROLL W. COLFORD

Petitioner,

v.

CHUBB LIFE INSURANCE COMPANY OF AMERICA

Respondent.

On Petition For Writ of Certiorari To
The Maine Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

Carroll W. Colford petitions for a writ of *certiorari* to review the judgment of the Maine Supreme Judicial Court in this case.

OPINIONS BELOW

The initial opinion of the Maine supreme court is reported at 681 A.2d 1171 (Me. 1996). A superseding version of the opinion is reported at 687 A.2d 609 (Me. 1996), along with an order denying in part and granting in part Petitioner's motion for reconsideration. Appendix at 18a. The order (December 7, 1994) and judgment (October 4, 1994) of the Maine Superior Court are unpublished, but they are reprinted in the Appendix at 19a and 27a, respectively.

JURISDICTION

The judgment of the Maine supreme court was entered on August 13, 1996. Petitioner submitted a timely motion for reconsideration on August 27, 1996. On November 27, 1997, the Maine supreme court withdrew its August 13 opinion, denied in part and granted in part the motion for reconsideration, and issued a substituted opinion. App. 1a. On February 13, 1997 Justice Souter extended the time for filing a petition for writ of certiorari to and including April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

STATEMENT

This case arises out of an insurance company's refusal to pay disability coverage to Carroll Colford, one of its former agents who permanently injured his back in a fall down a staircase. The insurance company's refusal to pay compelled Colford to file a lawsuit. In addition to its refusal to cover Colford's disability, the company took actions during the course of litigation that a jury found to be malicious. The jury returned a unanimous verdict that awarded Colford compensatory and punitive damages for the emotional distress the insurance company caused him—damages totaling some $25 million. The trial court, however, granted judgment as a

matter of law for the insurance company on Colford's claim for intentional infliction of emotional distress, despite the court's earlier judgment denying the company's motion for directed verdict before the issue went to the jury. The state supreme court affirmed, leaving Colford bereft of any remedy at all.

The Question Presented asks this Court to decide whether the judgment of the Maine supreme court rests on inadequate State grounds. In the proceedings before the Maine supreme court, both parties briefed whether the punitive damages award violates the Fourteenth Amendment Due Process Clause. The court avoided that substantial federal question by deciding that no reasonable jury could find the insurance company liable to Colford for intentional infliction of emotional distress. This Court has jurisdiction to decide whether the asserted grounds of that judgment under Maine law are adequate to avoid the federal question. We argue that they are not. This Court should grant the petition to decide whether a State court may avoid having to calibrate a punitive damages award under the constitutional standard articulated in *BMW v. Gore*, 116 S.Ct. 1589 (1996) by denying tortious liability on inadequate State grounds.

1. For many years Carroll Colford managed a successful family-owned property and casualty insurance agency in Waterville, Maine. Early in 1991 Colford determined that he was underinsured. To correct this deficiency he applied for a Professional Protector Individual Disability Policy (Policy) offered by Respondent Chubb Life Insurance Company of America (Chubb). The Policy would entitle him to $2,000 per month if he became totally disabled. Colford also applied for an additional "own occupation" benefit available under the

plan. This benefit covers an insured if he becomes disabled and unable to perform his listed occupation, even if his disability does not prevent him from performing other kinds of work. By sending Chubb one month's premium prepayment with his application and submitting to a medical examination, Colford became eligible for temporary insurance coverage under a Binder.

Less than a week after Colford applied for the Policy and completed the required paramedical examination, he fell down a staircase, severely injuring his back. Colford's physician concluded that this disability permanently prevented Colford from working as an insurance agent because the injury rendered him physically unable to do the extensive driving, sitting, and walking necessary to serve his clients. Other physicians shared that opinion regarding Colford's future as an insurance agent. The Social Security Administration of the United States found Colford permanently disabled. The Workers' Compensation Commission for the State of Maine approved Colford's claim for benefits and approved a settlement in which it found that Colford's accident had left him permanently disabled. Even Colford's group disability insurer, Crown Life Insurance Company, allowed his disability claim.

Chubb received Colford's written notice of claim on June 4, 1991. In a letter dated June 6, 1991, Chubb advised Colford that the company had declined to issue him an insurance policy and returned his premium prepayment.

2. In March 1992 Colford filed the present action against Chubb to recover the disability coverage. The final amended complaint stated three causes of action. "Count I" asserted

that Chubb was liable to Colford for breach of contract for failing to pay benefits due under the temporary insurance agreement. "Count III" asserted that Chubb was liable to Colford for intentional infliction of emotional distress based on actions Chubb took in the course of investigating Colford's claim and in denying coverage to Colford.[1] "Count IV" alleged negligent infliction of emotional distress. Based on his tort actions, Colford sought punitive damages for Chubb's malicious conduct toward him.

At trial Colford offered proof that Chubb's underwriter was aware of Colford's pending claim and that this information influenced its decision not to insure Colford. Colford also showed that Chubb Securities falsely informed the SEC that Colford wished to voluntarily terminate his registration as a SEC-Series-7 licensee with Chubb Securities. Without this SEC license, which is difficult to obtain, neither Colford nor his business could offer clients financial services.

Other evidence lent further support to Colford's allegations of malice on the part of Chubb. In July 1993 Chubb's litigation counsel attended Colford's workers' compensation

---

[1] Claims against insurance companies for intentional infliction of emotional distress are a common feature of insurance litigation. *See, e.g,* Walston v. Monumental Life Ins. Co., 923 P.2d 456, 464 (Idaho 1996) (holding that insurance company that misrepresented the scope of coverage and refused to pay good faith claim was liable for intentional infliction of emotional distress); Borden v. Paul Revere Life Ins. Co., 935 F.2d 370, 381 (1st Cir. 1991)(holding insurance company liable for intentional infliction of emotional distress when it withheld a benefit payment and attempted to coerce the insured into trading current disability policy for an inferior one); Tuck v. United Services Automobile Assoc., 859 F.2d 842, 843 (10th Cir. 1988)(noting that jury found insurance company liable for intentional infliction of emotional distress and awarding punitive damages).

hearing. Chubb's attorney sat behind the attorney for the workers' compensation insurer, Hanover Insurance Company (Hanover). Testimony at trial indicated that Chubb's decision to send its litigation counsel to the hearing was an apparent attempt to prevent Colford from obtaining his workers' compensation benefits—a tactic that profoundly upset Colford, given his financial distress and his 14 years of service as an general agent for Chubb. In the same month as this hearing (July 1993) Colford submitted to "an independent medical exam" from a physician employed by Chubb for the purpose of obtaining information on Colford's neurological condition. According to testimony given by both Colford and his wife, Chubb's doctor was sarcastic, rude, and indifferent to Colford's personal comfort—still further indicia of actions the jury construed, in the aggregate, as manifesting Chubb's intentional infliction of emotional distress.

Chubb's tactics eventually took their toll on Colford's financial and physical well-being. He lost his business assets when he could no longer keep up with the mortgage payments. In addition to the debilitating effects of his back injury, Colford suffered from chronic anxiety, depression, and a concomitant loss of sleep and appetite, because of his worries over Chubb's refusal to pay disability benefits and because of his shock at how Chubb and its agents treated him during the course of the litigation. Colford became very sick. He developed ulcers and began to vomit blood because of anxiety caused by Chubb's refusal to honor the Binder and by its litigation tactics.

3. At trial the parties agreed to let the court interpret the legal significance of the terms of the document (a "conditional receipt") on which Colford's breach of contract claim was

predicated. The parties also agreed to let the court compute the present cash value of the disability policy, assuming that the jury returned a verdict indicating that Chubb was liable for breach of contract. The jury was to decide all elements of Colford's tort claims.

At the close of evidence, Chubb moved for a directed verdict on Colford's claims for negligent and intentional infliction of emotional distress. The court granted the motion on the claim for negligent infliction of emotional distress but denied it on the claim for intentional infliction of emotional distress. As to the latter, the court specifically found that Colford had presented certain "factors" indicating that it was appropriate to submit that claim to the jury.

The trial court held that the "conditional receipt" was a contract in effect on the date of Colford's accident. The jury accordingly was instructed that a valid contract existed on the date Colford was injured. At Chubb's request, and over Colford's objection, the court also asked the jury to decide whether Chubb had acted in good faith in denying coverage under any policy of insurance.

The jury returned a special verdict form which answered each interrogatory in Colford's favor. For compensatory damages, the jury returned a verdict of $500,000 for emotional distress and $1 million in consequential damages as foreseeable consequences of Chubb's conduct and its denial of Colford's disability claim. After a one-week cooling-off period the court held a special punitive damages hearing. The jury unanimously returned a verdict of $25,002,000.

On October 4, 1994 the trial court entered a judgment for Colford on each count. On Count I (breach of contract) the court entered a judgment for $1,465,356 in compensatory damages. On Count III (intentional infliction of emotional distress) the court entered a judgment for $500,000 in compensatory damages and $24,002,000 in punitive damages.

On December 7, 1994 the court substantially reversed its October 4 judgment when it granted Chubb's motion for judgment as a matter of law on the claim for intentional infliction of emotional distress. The court also issued an order granting in part Chubb's motion for judgment as a matter of law on the breach of contract claim. It remitted consequential damages from $1 million to $352,000 and added interest and costs of $31,932.65 to the disability contract damage assessment for a total judgment on all counts of $817,356. Chubb appealed to the Maine supreme court, and Colford cross-appealed. Both parties briefed the *BMW* issue.

On appeal the Maine supreme court reversed even the trial court's remitted judgment and held for Chubb on all counts. Colford argued that the trial court had erred in setting aside the jury verdict in his favor on the claim for intentional infliction of emotional distress. The court held that Chubb's actions, including the revocation of Colford's securities license, the participation of Chubb's attorney in Colford's workers' compensation hearing, its decision to revoke the waiver of life insurance premiums, and the doctor's conduct during Colford's examination did not "constitute the kind of conduct that supports a cause of action in tort for intentional infliction of emotional distress . . . ." App. at 17a. The court did not reach the *BMW* question.

REASONS FOR GRANTING THE PETITION

This case presents a *bona fide* issue under *BMW v. Gore*, 116 S.Ct. 1589 (1996). In that case the Court held that a $2 million punitive damages award was grossly excessive in violation of the Fourteenth Amendment Due Process Clause. *Id.* at 1604. In the instant case, although virtually the same question is in play—the constitutional implications of the jury's $24 million punitive damages award to Mr. Colford—the Maine supreme court forestalled the prospect of addressing that question when it decided that the jury improperly found Chubb liable for intentional infliction of emotional distress. Because the lower court's judgment lacks substantial support in Maine law, this Court has jurisdiction to address the federal question that the Maine supreme court avoided.

It is important that the Court review this case because it illustrates the potential confusion faced by lower courts in the post-*BMW* environment, where the task of defining the constitutional contours of punitive damage awards remains daunting. The complex calibration of remittitur required to bring state court judgments into phase with due process heightens the risk that lower courts may improperly avoid the constitutional question altogether. To be sure, it is not the job of this Court to involve itself in state court determinations of state tort law, *per se*, and we do not suggest that state court motives on this score could or should generally be second-guessed. Nevertheless, when issues of punitive damages are in play, when the operative constitutional standard is complex and unpredictable, and when the economic and political consequences of punitive damage awards create high-stakes institutional alignments—it should not be surprising to find state courts opting for the path of least resistance, rather than

undertaking a *BMW* analysis. When, as in the case at bar, it is clear that the state law predicate for extinguishing the underlying tort is inadequate, well-established precedent gives this Court the jurisdictional basis to correct the mistake.

Although we believe that the Court has jurisdiction over the federal question and that the punitive damages award in this case can survive constitutional scrutiny, we suggest that the Court conserve its resources by remanding the case with instructions for the Maine supreme court to resolve whether the punitive damages award is grossly excessive, as that term is explained and applied in *BMW*.

* * *

After deciding that sufficient evidence had been presented to let the jury hear Colford's claim for intentional infliction of emotional distress and *after* the jury awarded Colford over $24 million, the trial court changed its mind and decided that Colford had failed to prove Chubb liable in tort after all. *See* App. at 20a-26a. The Maine supreme court affirmed this decision. *See* App. at 13a-17a. It reached this surprising conclusion on the basis of three assertions. First, it said that the conduct of a physician employed by Chubb for the purpose of obtaining a neurological examination of Colford "cannot be attributable to Chubb." Second, it said that the attendance of Chubb's litigation counsel at Colford's workers' compensation hearing and his communications with counsel for the insurer "do[ ] not constitute the kind of conduct that supports a cause of action in tort for intentional infliction of emotional distress." Third, in the court's view neither Chubb's false statements to the SEC, which caused Colford to lose his license, nor Chubb's decision to terminate the waiver of his life insurance premiums "rise[s] to the level of extreme and

outrageous [conduct], or exceed[s] all possible bounds of decency." *Ibid.* In short, the Maine supreme court held that Colford had failed to make out a *prima facie* case of intentional infliction of emotional distress.

1. Ordinarily a judgment such as this one, deciding whether a plaintiff has proved the elements of a common law tort, lies beyond the purview of this Court. The United States Constitution generally leaves States free to define and apply their own common law without the intervention of federal courts. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that "[t]hat there is no federal general common law"). This rule, borne of due respect for the province of State authority, applies in the vast majority of instances. Occasionally, however, certain narrow exceptions apply.

Such an exception arises in cases "where . . . the existence or the application of a federal right turns on a logically antecedent finding on a matter of state law." Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court*, 34 WASH. & LEE L. REV. 1043, 1052 (1977). *Howlett v. Rose*, 496 U.S. 356 (1990) illustrates how the Court addresses such cases.

In *Howlett* a former high school student brought an action against the local school board and three school officials. *Id.* at 358-59. He alleged that an assistant principal illegally searched his car while it was on school property and then wrongfully suspended him from classes. *Id.* at 359. His action contained claims under 42 U.S.C. § 1983—he argued that his rights under the federal Constitution had been violated—as well as claims under the state constitution. *Id.*

The school board argued that the state trial court lacked jurisdiction over the plaintiff's Section 1983 claims "because the Florida waiver-of-sovereign-immunity statute did not extend to claims based on § 1983." *Id.* The trial court dismissed the student's Section 1983 claim, the court of appeals affirmed, and the Florida Supreme Court declined to review the case. *Id.* at 359-60.

When the case reached this Court it presented a single question: whether a school board, which is otherwise amenable to suit in state court, may raise sovereign immunity as a defense against claims under 42 U.S.C. § 1983, "even though such a defense would not be available if the action had been brought in a federal forum." *Id.* at 359. A unanimous Court held that the answer is "No": a defense rooted in state law, which purports to shield a school district from liability under valid federal law, "flatly violates the Supremacy Clause." *Id.* at 381.

The Court began with the premise that it had jurisdiction to decide for itself whether the school board's sovereign immunity defense was sufficient to preclude it from reviewing the student's federal claims.

> The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review *de novo*.

Id. at 366 (citing *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958); *Rogers v. Alabama*,

192 U.S. 226, 230-31 (1994); Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 954-57 (1965)). In a footnote the Court explained the basis and rationale for inquiring into the adequacy of a judgment made on grounds of State law, when the answer to that question determines the existence or application of a federal question.

> [We have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds "fair or substantial support" in state law. . . . *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234 (1969); *NAACP*, 357 U.S. 449, 454 (1958); *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930). The reasons for that rule rest on nothing less than this Court's ultimate authority to review state-court decisions in which "any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257(a); *see Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816). "To hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute & Indianapolis R.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579, 589 (1904) (Holmes, J.).

Id. at 366-67 n.14.

It should be obvious that these well-settled principles do not empower the Court to review every State court judgment across the Nation. The conditions under which the Court may inquire into the adequacy of a judgment founded on State law create a narrow but indispensable category of cases over which this Court may exercise jurisdiction. The category is

narrow because it comprises only cases that present a federal claim whose existence or application turns on a question of State law. It is indispensable because without it state courts would be free to evade their obligation under the Supremacy Clause to enforce federal law as "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. CONST. art. VI.

Here, the Court is ostensibly precluded by a State law decision from addressing the federal question presented below: the constitutionality of the $24 million in punitive damages the jury awarded to Colford. The state court did not reach that question because Maine law requires proof of tortious liability as a predicate for awarding punitive damages, and the court denied that Chubb was liable in tort. Here, as in *Howlett*, a judgment made on State grounds has shut the door on the case. But just on the other side of that door stands a substantial federal question. To determine whether this Court has jurisdiction to address the question presented, it must first decide whether the Maine court had "fair or substantial support"[2] in Maine law for its judgment that Colford had failed to prove Chubb liable for intentional infliction of emotional distress.

---

[2] The Court has been less than consistent in the scope of review (and conversely, the level of deference) it has applied when asked to determine whether a State ground of decision is adequate. Because the Court applied the "fair or substantial support" test in *Howlett*, 496 U.S. 356, 366 n.14 (1990), a relatively recent case that addresses the question of inadequate state grounds in some detail, we understand that standard to be controlling. *Accord* 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 4033, at 468 (2d ed. 1996) (asserting that "[t]he 'fair support' phrase seems the best method of expressing the scope of review").

2. Maine law provides no substantial support for affirming a postverdict judgment as a matter of law on Colford's claim for intentional infliction of emotional distress, especially since the trial court had earlier determined that sufficient evidence had been presented to warrant submitting the question to the jury. *See Gurski v. Culpovich*, 540 A.2d 764, 767 (Me. 1988); *Rubin v. Matthews International Corp.*, 503 A.2d 694, 699 (Me. 1985).

Under Maine law a plaintiff must prove the following elements to establish a *prima facie* claim of intentional infliction of emotional distress:

> (1) [T]he defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979) (internal citations omitted).

In affirming the trial court's judgment notwithstanding the verdict on Colford's claim for intentional infliction of emotional distress, the Maine supreme court focused on the second element of the cause of action, namely whether Chubb's conduct was "extreme and outrageous." The court

held that it was not. To see how little support Maine law provides this holding, it is illuminating to compare Chubb's conduct in this case against defendants' conduct in other cases where the Maine supreme court has had to determine whether a defendant's conduct is sufficiently outrageous to sustain a claim for intentional infliction of emotional distress.

The state supreme court has affirmed findings of conduct as extreme and outrageous on the basis of less egregious acts than those committed by Chubb in this case. In *Latremore v. Latremore*, 584 A.2d 626 (Me. 1990) a son demanded that his parents pay $3000 rent for an apartment, threatened to evict them if they did not pay, continued threatening them despite their age and the illness of his father's wife, made vicious remarks to his father about his mental condition, and elicited his sister's help in trying to have his father declared mentally incompetent. The court held that such conduct qualified as extreme and outrageous. *See Rubin v. Matthews International Corp.*, 503 A.2d 694, 700 (Me. 1985) (holding that repeated misrepresentations of the delivery of a monument for the unveiling ceremony and the circumstances in which they were made states a cause of action for intentional infliction of emotional distress). When reviewing a motion for attachment to determine whether the evidence more likely than not supports the claim of intentional infliction of emotional distress, the Maine supreme court has held that a fact finder could find that a prolonged campaign causing humiliation, professional anxiety, loss of sleep and appetite, crying episodes, fear of losing a home, and distraction and fear qualifies as extreme and outrageous conduct. *See Vogt v. Churchill*, 679 A.2d 522, 524 (Me. 1996).

Chubb's conduct in this case fits comfortably within the kind of facts previously found to qualify as extreme or outrageous. Rescinding Colford's life insurance premium waiver, hiring a rude and insensitive physician to perform a neurological exam, making false statements that resulted in the loss of Colford's difficult-to-obtain securities license, and the attendance of litigation counsel at Colford's workers' compensation hearing in an apparent attempt to prevent Colford from obtaining worker's compensation benefits—in the aggregate amount to conduct that at least equals the conduct otherwise held by Maine courts to qualify as sufficiently outrageous to supply a foundation for intentional infliction of emotional distress. It is therefore not surprising that the jury returned a unanimous verdict in Colford's favor.

On the other hand, Chubb's conduct exceeds the conduct of defendants in cases where the Maine supreme court refused to find the defendant liable for intentional infliction of emotional distress. In one case the plaintiff complained about the manner in which the fire department inspected his business office. *Pelky v. City of Presque Isle*, 685 A.2d 429 (Me. 1996). In another case the court found that an insurance company had not acted so outrageously as to support a claim for intentional infliction of emotional distress when it repossessed the plaintiff's truck without notice, causing the plaintiff to feel depressed, mad and nervous for about a month. *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979). Likewise, the fact that publishing the terms of a settlement generated so great a strain on the plaintiff's marriage as to require marital counseling was held not to be outrageous. *Loe v. Town of Thomaston*, 600 A.2d 1090 (Me. 1991). A plaintiff's complaint that his former supervisor humiliated him at staff meetings and demoted him without cause was held not

to be extreme and outrageous. *Staples v. Bangor Hydro-Electric Co.*, 561 A.2d 499 (Me. 1989). Realtors were held not to have acted outrageously when they made certain statements to purchasers regarding the condition of a house, which developed serious problems with the septic system, the sump pump, the chimney, and the structural integrity of the building after the purchasers moved in. *Butler v. Poulin*, 500 A.2d 257, 258, 261 (Me. 1985). Finally, in what is probably the closest case, in light of competent evidence on which the state based its decisions, a human services caseworker's neglect or refusal to interview available professionals with exculpatory explanations for the child's symptoms and the caseworker's misrepresentation of the opinions of two social workers to buttress his own suspicions, was held to be insufficiently extreme and outrageous to warrant recovery from state. *Gray v. State of Maine*, 624 A.2d 479 (Me. 1993). The egregiousness of Chubb's repeated misconduct, and its physical effects on Colford—he vomited blood, acquired ulcers, suffered nausea, and lost sleep out of anxiety over Chubb's actions—exceed even these troubling facts.

In sum, because the lower court's judgment that Colford failed to prove Chubb liable for intentional infliction of emotional distress is inadequate under Maine law, this Court may squarely address the federal question presented in this case.

3. In its reply brief to the Maine state court, Chubb claimed that the $24 million punitive damage award handed down by the jury was "grossly excessive" and therefore violated the Fourteenth Amendment Due Process Clause. Colford replied that it did not. His position is justified, in light

of the Court's recent teaching in *BMW v. Gore*, 116 S.Ct. 1589 (1996).

In *BMW*, 116 S.Ct. at 1599-1603, the Court established a tripartite test for determining whether a punitive damage award is "grossly excessive" so as to violate the Due Process Clause. That test includes the following guidelines: "the degree of reprehensibility of the defendant's conduct," *id.* at 1599, the ratio of a punitive damage award "to the actual harm inflicted on the plaintiff," *id.* at 1601 (citations omitted), and a comparison of "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *Id.* at 1603. The $24 million punitive damages award, which the jury handed down in Colford's favor, meets these guidelines.

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 1599. Colford presented more than enough evidence of "affirmative misconduct," *id.* at 1601, to measure up to this "most important" standard of reasonableness. Chubb not only caused Colford substantial economic losses because of its refusal to honor the Binder; the losses were personal and distressing. Chubb's agent--a physician it hired to perform an "independent" medical exam—tormented him. Chubb's attorney apparently tried to prevent Colford from receiving desperately needed workers' compensation benefits. Chubb rescinded a waiver of premiums, apparently to strengthen its litigation position, which eventually meant that Colford lost his life insurance. And Chubb misrepresented facts to the SEC, causing Colford to lose his securities license. This misconduct by Chubb caused Colford to suffer ulcers and nausea; the constant and

mounting anxiety brought on by how Chubb treated him even caused him to vomit blood. Such conduct surely deserves the word "reprehensible."

Another measure of the constitutionality of a punitive damages award is "its ratio to the actual harm inflicted on the plaintiff." *Id.* at 1601. The jury in this case handed down a punitive damages award approximately 48 times larger than the amount it awarded in compensation for Colford's emotional distress. In *BMW* this Court noted that it was "not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award." *Id.* at 1604. While the ratio in any case must be "reasonable," *id.* at 1601, determining the reasonableness of the 48:1 ratio is a heavily fact-laden question. It does not present a "breathtaking" figure, such as the 500:1 ratio faced by the Court in *BMW*. *Id.* at 1603. The very least that can be said is that the severity of Chubb's conduct and the harm it caused Colford mark this case as significantly different from the failure of a car manufacturer to tell a consumer that his car has been repainted. *Accord Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996) (holding that a ratio of 26:1 is not constitutionally impermissible when the defendant insurance company defrauded a man whose wife died of cancer and then refused to pay him the health insurance benefits promised in its marketing brochure). In any event, the Court made it clear that "[i]n most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *BMW v. Gore*, 116 S.Ct. 1589, 1603 (1996). So long as the defendant's conduct is sufficiently reprehensible, as the facts of this case amply demonstrate, and the award does not significantly diverge

from comparable civil and criminal penalties, we would not anticipate a remittitur on the basis of a 48:1 ratio alone.

The Court in *BMW* expressed its concern that a potential defendant in a case where punitive damages are awarded "receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Id.* at 1598 (footnote omitted). To this end the Court indicated that it would be appropriate to compare the punitive damages award in a particular case with "the civil or criminal penalties that could be imposed for comparable misconduct." *Id.* at 1603. An award of $24 million, while large, does not dwarf what a nationwide insurance company could anticipate from denying a former agent's disability insurance claim and then engaging in "affirmative misconduct." *Id.* at 1601. Chubb received fair notice that its conduct might result in a multimillion dollar award against it.

* * *

We urge the Court to grant plenary review. In the alternative, we request that the Court summarily reverse the Maine supreme court's judgment because it avoided the decision as to the constitutionality of the $24,002,000 punitive damages award by basing its decision on inadequate State grounds. If the Court agrees, we further request that it remand the case to the Maine supreme court with instructions to address this substantial federal question in light of *BMW*.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Ronald D. Maines
(*Counsel of Record*)
R. Shawn Gunnarson
MAINES & LOEB, PLLC
2300 M Street, N.W., Suite 900
Washington, D.C. 20037
(202) 223-2817

April 7, 1997

Carroll COLFORD

v.

CHUBB LIFE INSURANCE COMPANY OF AMERICA.

Supreme Judicial Court of Maine.

Argued May 7, 1996
Decided August 13, 1996
Order Nov. 27, 1996
Reissued Dec. 3, 1996

Daniel G. Lilley (orally), Mark L. Randall, Daniel G. Lilley Law Offices, P.A., Portland, for Plaintiff.

William J. Kayatta, Jr., (orally), Catherine R. Connors, Pierce, Atwood, Scribner, Allen, Smith & Lancaster, Portland, for Defendant.

Jack H. Simmons, Paul F. Macri, Berman & Simmons, P.A., Lewiston, for University Scholars and Law Professors.

Paul R. Dumas, Jr., Joyce Dumas David and Hanstein, P.A., Mexico, for Consumer Federation of America.

Edward W. Gould, Gross, Minsky, Mogul & Singal, P.A., Bangor, for Maine Trial Lawyers Association.

Christopher C. Taintor, Norman, Hanson & Detroy, Portland, for UNUM, American Council of Life Ins., Health Ins. Assoc. of America.

Before ROBERTS, GLASSMAN, CLIFFORD, RUDMAN, DANA and LIPEZ, JJ.

CLIFFORD, Justice.

Chubb Life Insurance Company of America (Chubb) appeals from a judgment entered in the Superior Court (Somerset County, *Kravchuk*, J.) awarding plaintiff Carroll Colford compensatory and consequential damages for the breach of an insurance contract. Chubb contends that the court erred as a matter of law in concluding that two conditions of the contract issued to Colford, conditions that Colford did not meet, did not preclude contract recovery. Colford cross-appeals from the judgment notwithstanding the verdict in favor of Chubb on Colford's claim for intentional infliction of emotional distress and an award of punitive damages. Colford contends that Chubb did not properly preserve the contract issue, that in any event the court correctly construed the contract, that there was sufficient evidence to support the emotional distress claim and, therefore, the court erred in setting aside the jury's verdict and assessment of emotional distress and punitive damages. We conclude that Chubb properly preserved the issue of the validity of the contract. The formation of a binding insurance contract with Colford was contingent on Colford being "acceptable on that date under the Company's rules . . . for the [plan] and benefits . . . applied for." Because those conditions were not satisfied, there was no contract in effect and thus there was no breach of contract. Accordingly, we vacate the judgment on the breach of contract claim. Because Chubb's conduct does not rise to the level of outrageousness necessary to support a claim of intentional infliction of emotional distress, we affirm the judgment notwithstanding the verdict on that claim and on the award of punitive damages.

Carroll Colford was a self-employed insurance sales agent who sold policies for a number of insurance carriers, including Chubb. On April 22, 1991, Colford applied for disability

insurance with Chubb. Colford applied for coverage providing a benefit amount of $2000 per month, payable in the event he became permanently disabled.[1] Colford also applied for the additional "own occupation" benefit available under the plan which covers the insured if he becomes disabled and unable to perform his listed occupation, even if he is not disabled for purposes of other types of work. On that date, Colford was given a one-page "Receipt and Conditional Insurance Agreement." The conditional receipt states in pertinent part:

> 1. DATE INSURANCE BEGINS. The insurance will begin on the latest of the date of the Receipt, the date of the Application, or the date of the last Medical Application, Part II, required by the Company on all persons proposed for insurance SUBJECT TO THESE TERMS AND CONDITIONS AND THOSE OF THE POLICY APPLIED FOR.
>
> > a. An advance payment at least equal to one month's premium must be made in exchange for the completed receipt which bears the same date and number as the application; it cannot be less than $50.00; and
> >
> > b. *All persons proposed for insurance are acceptable on that date under the Company's rules for standard rates for the plan, benefits and amounts applied for.*
>
> 2. DATE INSURANCE ENDS. Insurance will end on the earliest of these dates, *if* it begins under the Conditional

---

[1] The coverage was referred to as the Professional Protector Plan.

Insurance Agreement:

> a. 60 days after the date of the receipt; . . . .
>
> c. The date the advance payment is mailed to the Owner;
>
> d. The date the policy is issued and delivered to the Owner on a standard basis; the first premium must be paid in full.
>
> 3. PREMIUM REFUND. Return of the advance payment will be made to the Owner, if insurance is declined, or the policy, if any, as issued is not taken. If the policy is taken, the advance payment will be a credit toward the first year's premium due under the policy.

(Emphasis added.) An integration clause at the bottom of the receipt provides: "This Agreement states all the terms and conditions of your agreement with the Company for Conditional Insurance."

As of April 25, 1991, Colford had completed the application, tendered one month's premium, and submitted to the required medical examination. On April 30, 1991, Colford fell down a flight of stairs and seriously injured his back. The pain and stiffness resulting from his injury was aggravated by sitting, thus rendering prolonged driving intolerable. As a self-employed insurance sales agent, Colford drove approximately one thousand miles per week.

Colford did not immediately inform Chubb of his injury. On May 3, Philip Wolfe, the Chubb underwriter responsible for evaluating Colford's eligibility for a permanent insurance policy, informed Colford that he was not eligible for the "own

occupation" benefit because this extra rider was not available for the job classification "insurance agent." On May 20, Wolfe offered Colford a permanent insurance plan at standard rates, but with two changes from Colford's initial application: (1) the "own occupation" benefit rider would not be included; and (2) there would be an exclusion rider for back injuries. Colford was not offered "whole body" coverage because his medical history revealed a 1989 diagnosis for scoliosis and a spinal dislocation/misalignment known as "subluxation." Pursuant to Chubb's underwriting policies and guidelines, this pre-existing condition precluded coverage for back injuries. Colford did not file a claim for his injury until June 4.[2] Because Chubb had already determined that the conditions stated in the conditional insurance agreement had not been satisfied, Chubb denied Colford's claim for lack of any existing coverage in effect.

Colford filed this action in March 1992. Colford's final amended complaint asserts three claims: (1) breach of contract on the part of Chubb for failure to pay benefits due under the temporary, conditional insurance agreement (Count I); (2) intentional infliction of emotional distress based on actions Chubb took in the course of its investigation and in denying coverage to Colford, and other actions of Chubb (Count III); and (3)

---

[2] Colford argues that Chubb may have become aware of Colford's fall prior to his determination that Colford was not eligible for the "own occupation" coverage or for whole body coverage, and therefore Chubb's decision was tainted by such knowledge. There is insufficient evidence in the record to support a finding that Chubb became aware of Colford's fall prior to its determination as to the own occupation benefit rider and the back injury exclusion.

negligent infliction of emotional distress (Count IV).[3] In addition, Colford seeks punitive damages for Chubb's allegedly malicious conduct toward him.

By agreement of the parties, the court reserved for itself the question whether a binding contract for insurance existed as of the date of Colford's injury. The court determined that the contract was valid and in effect on the date of the injury. The jury was told that there was a contract and was instructed to determine whether Chubb acted in good faith in denying coverage under the contract, whether Colford was in fact disabled so as to trigger Chubb's obligation to pay benefits, whether Colford, by virtue of his prior income, was eligible for the $2000 monthly coverage amount he had applied for, and whether Colford had fraudulently overstated his yearly income on his initial application. The parties agreed that the court would calculate the present value of all past and future disability payments, and the jury would determine the amount of any consequential contract damages arising from the failure to pay benefits. All elements of Colford's tort claims, Counts III and IV, were to be determined by the jury.

At the close of the plaintiff's case, Chubb moved pursuant M.R. Civ. P. 50(a) for judgments as a matter of law on Counts III and IV. The court granted Chubb's motion on Count IV, the negligent infliction of emotional distress claim.[4] At the close of all the evidence, Chubb's renewed motion pursuant to M.R. Civ. P. 50(b) for judgment as a matter of law on Count III, the

---

[3] Count II, alleging civil conspiracy to defraud, was dismissed by an earlier motion. The dismissal is not challenged on appeal.

[4] Colford does not challenge this decision on appeal.

intentional infliction of emotional distress claim, was denied. The court denied Chubb's request to allow the jury to determine whether Colford was eligible for the "own occupation" benefit and for whole body coverage.

The jury returned a special verdict form, answering the interrogatories in favor of Colford on all the questions: that Chubb had refused to issue a permanent policy to Colford in bad faith, that Colford had not misrepresented his income, that he was in fact disabled, and that Chubb's actions satisfied all of the elements of the tort of intentional infliction of emotional distress. The jury awarded Colford consequential breach of contract damages in the amount of $1 million,[5] and compensatory damages in tort for emotional distress in the amount of $500,000. In addition, the jury found that Chubb had acted with malice. Subsequently, after a second hearing, the jury awarded Colford punitive damages for the emotional distress claim in the amount of $24,002,000.

Prior to the court's entry of a judgment, Chubb filed a motion for judgment as a matter of law pursuant to M.R. Civ. P. 50(d) as to Count I. On Count I, the court determined the value of past and future disability benefits to be $465,350 and entered a judgment for Colford on Count I in the amount of $1,465,350 (the $465,350 plus the $1 million in consequential damages found by the jury). The court later reduced the jury's consequential damages award from $1 million to $352,000, and entered a final judgment on Count I in the amount of $817,350 ($465,350 disability damages plus consequential damages of $352,000). The court granted Chubb's renewal of its Rule 50(b) motion for a

---

[5] The consequential damages were based on Colford's loss of his income-producing real estate, which he attributed to Chubb's wrongful denial of disability coverage.

judgment as a matter of law on Count III, setting aside the jury's verdict because the elements of the tort of intentional infliction of emotional distress had not been proved. The court also set aside the award of punitive damages. These appeals by both parties followed.

I. The Breach of Contract Claim

A.

Colford contends that Chubb has not preserved the breach of contract issue because it failed to move for a judgment as a matter of law on that issue prior to the jury's retiring for deliberations. We disagree. Chubb's Rule 50(d) motion was directed primarily at the issue that the court, with the consent of the parties, reserved to itself, i.e., the construction of the conditional contract. Although the court tentatively had decided that issue during the trial and before the jury answered the interrogatories presented to it, the court addressed the issue again following the filing of the Rule 50(d) motion and prior to the entry of a judgment on Count I. Rule 50(d) allows a motion for judgment as a matter of law to be made at any time on any claim in an action tried to a court. Although this was a jury trial, the issue that was the subject of the Rule 50(d) motion was for the court, and no one has asserted that evidence could have been presented or any further legal argument made that would have had a bearing on the court's determination. Even were Rule 50(d) to be read narrowly so as not to apply here where the case was not tried entirely to the court, Colford did not object to the timing of Chubb's Rule 50(d) motion and, accordingly, failed to preserve the issue of timeliness. *See Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995) (defendant's failure to raise defense at pre-verdict motion does not preclude consideration of that defense in post-verdict motion when plaintiff failed to object).

B.

In reserving to itself the construction of the conditional contract, the court correctly concluded that the contract is unambiguous and that its interpretation is a question of law. *Globe Indem. Co. v. Jordan*, 634 A.2d 1279, 1282 (Me. 1993). A contract is ambiguous only if it is reasonably susceptible to two or more interpretations. *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995). If the contract is ambiguous, it will be construed against the insurer so as to comply with the objectively reasonable expectations of the insured. *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 386-87 (Me. 1989) (citations omitted). This is not to say, however, that every time an insurer and an insured disagree on the meaning of the contract, the insured's interpretation must prevail. Mere hope of coverage by the insured, or inability of the insured to understand the policy, does not render the contract ambiguous. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 19 (Me. 1990) ("There are many words, phrases or paragraphs in a standard insurance contract that a first time reader does not understand. That circumstance does not justify excising such provisions from the contract.") (footnote omitted); *see also Peerless*, 564 A.2d at 386 (overruling *Baybutt Constr. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914 (Me. 1983), stating that "the Court in *Baybutt* mistook complexity for ambiguity and thus erred in" ruling in favor of the insured).[6]

---

[6] Chubb since has issued a revised version of its "conditional receipt" that more clearly explains that coverage is contingent on the applicant being acceptable for the plan, benefits, and amounts for which he or she applied. Colford argues that this revised version is proof that the older version, issued to Colford, provides him coverage. We disagree. The fact that a term or phrase can be made clearer by the addition of more explicit language does not necessarily render that term or phrase

The trial court concluded that the insurance contract provided coverage to Colford on a *temporary* basis for the plan for which Colford applied and that the conditions relied on by Chubb to preclude coverage -- that there was no "own occupation" total disability coverage for an insurance agent, and that "whole body" coverage was not available to Colford because of his preexisting medical condition -- could apply only to the *permanent* insurance that was to be effective *after* Colford's injury. The court relied on language in *Palmer v. Mutual Life Ins. Co. of New York*, 324 F. Supp. 254 (D. Me. 1971), to conclude that Chubb's receipt and conditional insurance agreement was an "approval" type of receipt and created insurance that was temporary.

It is true that if Chubb's receipt and conditional insurance agreement were an "approval" type of receipt, i.e., one in which coverage depends on the subjective approval of the insurer and becomes effective only at the subjective discretion of the insurance company, then such an agreement likely would have created, only temporary insurance. *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 601-03 (2d Cir. 1947). The rationale for finding temporary coverage in such cases is that the subjective condition of approval creates an ambiguity, an illusionary promise on the part of the insurer, so that enforcement of the condition would be unconscionable. Id. at 602-03. Indeed, a few jurisdictions mandate that temporary coverage be in effect on nearly all conditional insurance agreements unless the insurance company returns the premium and rejects the application. *See Smith v. Westland Life Ins. Co.*, 15 Cal. 3d 111, 539 P.2d 433, 442, 123 Cal. Rptr. 649 (Cal. 1975). That rule, however, has

---

ambiguous. All statements can be made more explicit to some degree.

been adopted in only a few states and fails to give effect to the clear language appearing in Chubb's receipt.[7]

Chubb's receipt and conditional insurance agreement is not an approval type receipt. Coverage for the plan for which Colford applied did not depend on the subjective acceptance of the insurer. Rather, Colford's eligibility for the insurance plan for which he applied, disability insurance as an insurance agent, depended on certain criteria that were objectively reviewable: "own occupation" plans were offered only for certain occupations, and "insurance agent" was not one of those occupations,[8] and whole body coverage was not available for persons with certain medical histories, including Colford's.[9] The rejection of Colford's application based on these objective criteria was conveyed to Colford prior to Chubb's knowledge of his injury.

---

[7] For a helpful discussion on the meaning and effect of conditional premium receipts, *see Hildebrand v. Franklin Life Ins. Co.*, 118 Ill. App. 3d 861, 455 N.E.2d 553, 74 Ill. Dec. 280 (Ill. App. Ct. 1983).

[8] Chubb's underwriting manual makes clear that "insurance agent" is an identifiable occupation and that an "own occupation" rider is available only to certain specified occupations; the manual's list does not include insurance agents.

[9] Colford's medical records, available to Chubb before it learned of Colford's injury, disclose that he had been diagnosed with a medical condition, subluxation of the spine, indicating a dislocation or misalignment of the vertebrae. Chubb's medical underwriting manual required a rider excluding disabilities resulting from the middle or lower back when an applicant was diagnosed with subluxation of the spine.

These provisions of the receipt and conditional insurance agreement are unambiguous. Paragraph b of Part 1 is a condition precedent to the formation of a binding contract for temporary insurance. Contrary to Colford's interpretation that paragraph b is an affirmative statement that *all* applicants are acceptable, it clearly provides as a condition that applicants be acceptable based on Chubb's criteria. Paragraph b must be read in conjunction with and as an integral and essential part of the entire agreement. As we stated in *Peerless*:

> In determining whether an insurance contract is ambiguous, the long-standing rule in Maine requires an evaluation of the instrument as a whole.
>
> "A contract of insurance, like any other contract, is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be considered together that it may be seen if and how far one clause is explained, modified, limited or controlled by the others."

Peerless, 564 A.2d at 384-85 (quoting *Swift v. Patrons Androscoggin Mut. Fire Ins. Co.*, 125 Me. 255, 256, 132 A. 745 (1926)).

Paragraph b requires that an applicant be acceptable for the plan applied for in order to form a binding contract for temporary coverage.[10] An insurance policy is nothing more than the sum of its parts, including the benefits it provides and the

---

[10] If the applicant does meet the conditions of paragraph b and is acceptable, the coverage is effective from the date of the receipt or the date of the application.

injuries or accidents it excludes; any variation in these characteristics produces a qualitatively different policy. The plan for which Colford applied -- a plan *with* "own occupation" coverage and *without* any exclusion for back injuries -- was one for which he did not qualify and was not the plan he was offered. The fact that the advance premium paid was sufficient and did not constitute the reason why Colford was not acceptable does not convert the conditional receipt into temporary insurance without regard to the conditions.

Whether the conditions precedent to the formation of a binding contract have been satisfied ordinarily is a question of fact for determination by the jury. *Haworth v. Feigon*, 623 A.2d 150, 160 (Me. 1993). In this case, however, the parties agreed that the contract is unambiguous and that its interpretation is a question of law. Under the terms of this conditional contract, Colford was not eligible for the plan and benefits for which he applied, and therefore Chubb was entitled to a judgment as a matter of law.

II. Intentional Infliction of Emotional Distress

Colford also contends that the trial court erred in setting aside the jury verdict in his favor on the intentional infliction of emotional distress claim. To prevail on a claim of intentional infliction of emotional distress, the plaintiff must show that:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the

> emotional distress suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979) (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)) (comments and internal citations omitted).

"To challenge a jury's verdict on appeal, the appellant must demonstrate that, taking all evidence in the light most favorable to the plaintiff, together with any justifiable inferences, there was no credible evidence upon which a rational jury could have found the facts as it did." *Latremore v. Latremore*, 584 A.2d 626, 630 (Me. 1990) (citing *Gurski v. Culpovich*, 540 A.2d 764, 767 (Me. 1988)).[11]

In the context of an intentional infliction of emotional distress claim, we have stated that

> [i]t is for the Court to determine, in the first instance whether the Defendant's conduct may reasonably be

---

[11] Although the analytical standard essentially is the same when considering a motion for a judgment as a matter of law. M.R. Civ. P. 50, we have expressed a strong preference for the entry of a judgment notwithstanding the verdict, which avoids the need for a second trial should the trial court's decision be vacated on appeal. *Bedard v. Pellon*, 606 A.2d 205, 207 (Me. 1992); *Reed v. Rule*, 376 A.2d 445, 446 (Me. 1977) (citing *Moore v. Fenton*, 289 A.2d 698, 700 n.1 (Me. 1972)). Accordingly, the denial of a motion for a judgment as a matter of law and the subsequent grant of a judgment notwithstanding the verdict does not reveal confusion or waffling on the part of the trial court but, rather, demonstrates a wise use of judicial resources.

> regarded as so extreme and outrageous to permit recovery, or whether it is necessarily so. Where reasonable [people] may differ, it is for the jury, subject to the control of the Court, to determine whether, in a particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Rubin v. Matthews Int'l Corp., 503 A.2d 694, 699 (Me. 1986) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. h, at 77 (1965)). Thus, while the jury must determine whether the elements of the tort were in fact satisfied, the court must first determine whether, as a matter of law, the facts alleged are sufficient to satisfy the elements. *See also Gray v. State*, 624 A.2d 479, 484 (Me. 1993) ("The determination of extreme and outrageous conduct from undisputed facts is an issue for the court.").

In order to secure emotional distress and punitive damages in this action, Colford must demonstrate that Chubb committed *independently* tortious conduct *beyond* the denial of Colford's disability claim.[12] *See Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989). Colford relies on evidence that Chubb engaged in the following conduct: (1) In the defense of the contract claim. Chubb required Colford to submit to a medical examination, *see* M. R. Civ. P. 35, that the evidence showed was painful, was performed by a rude and sarcastic doctor, and upset Colford; (2) Chubb's attorney attended a

---

[12] The jury in this case concluded that Colford had proven the elements of intentional infliction of emotional distress in the context of their being told that there was a contract and after having found that Chubb had breached its contractual duty to pay Colford's disability claim in bad faith. As discussed in the opinion herein, because no such duty existed, no breach occurred.

hearing on Colford's claim for workers' compensation benefits[13] and communicated with the attorney for the insurance company (not Chubb) defending the claim. Such action upset Colford, who had been an agent for Chubb for a number of years; (3) despite having told Colford not to worry about his securities registration which he used to sell securities through Chubb Securities, a wholly-owned subsidiary of Chubb, Chubb Securities canceled the registration after hearing of Colford's disability and suit against Chubb Life; and (4) after initially waiving Colford's life insurance premiums because of the disability, Chubb subsequently revoked the waiver on the basis that Colford did not qualify for the waiver, and Colford subsequently lost his life insurance coverage for failure to pay his premiums. Colford presented evidence that he suffered emotional distress, citing a loss of sleep, bleeding ulcers, coughing up blood, depression and withdrawal from friends.[14] Additionally, at trial, Chubb witnesses invoked the attorney/client privilege and refused to answer questions concerning Chubb's pretrial conduct. Colford argues that such conduct on the part of the witnesses allowed the jury to infer that Chubb acted with improper motives.

Although Colford presented evidence of a cumulative number of acts and circumstances that adversely affected him in a substantial way, he must demonstrate that Chubb's actions arose independently of its denial of the disability claim, were

---

[13] Colford was found to be totally disabled for workers' compensation purposes.

[14] In addition, Colford was unable to meet the mortgage payments of his commercial and rental properties and subsequently lost both to foreclosure. The loss of this real estate was the basis for the consequential damages found by the jury to have been suffered by Colford on his breach of contract claim.

intentionally or recklessly inflicted, and were so "extreme and outrageous" as to exceed "all possible bounds of decency," and be regarded as "atrocious" and utterly intolerable in our civilized society. *Vicnire*, 401 A.2d at 154. The attitude and conduct of the physician who examined Colford, on this record, cannot be attributable to Chubb. Chubb's attorney's attendance at the workers' compensation hearing and communication with one of the attorneys for the employer's insurer does not constitute the kind of conduct that supports a cause of action in tort for intentional infliction of emotional distress. Neither do Chubb's actions concerning Colford's securities registration and Colford's life insurance premiums rise to the level of extreme and outrageous, or exceed all possible bounds of decency. Nor do they support a verdict of punitive damages. The court acted without error and within its discretion by entering a judgment notwithstanding the verdict on Colford's tort claim.[15]

The entry is:

Judgment as to Count I vacated. Remanded for entry of a judgment for the defendant on Count I. Judgment affirmed in all other respects.

All concurring.

---

[15] Because we conclude that Chubb is entitled to a judgment on all counts, we do not address other contentions of the parties.

STATE OF MAINE

SUPREME JUDICIAL COURT Docket No. SOM-94-928
Sitting as the Law Court Decision No. 7768

CARROLL COLFORD	)	
	)	
v.	)	**ORDER**
	)	
CHUBB LIFE INSURANCE CO. OF AMERICA	)	

Upon motion of the Plaintiff for reconsideration, it is ORDERED that the motion be and hereby is GRANTED in part.

It is ORDERED that the opinion published on August 13, 1996 as Decision No. 7768 and reported in the Atlantic Reporter at 681 A.2d 1171 (Me. 1996) be withdrawn. It shall be replaced by the opinion attached hereto.

The contention raised in the motion for reconsideration that there is the appearance of a conflict of interest relating to Law Clerks who may have worked on the opinion in this case is without merit. No Law Clerk employed by the Supreme Judicial Court was involved with this case at any time during which any potential conflict of interest existed.

The motion is DENIED in all other respects.

Dated: November 27, 1996

For the Court,

/s/ Robert W. Clifford
Robert W. Clifford, Assoc. Justice

STATE OF MAINE
SOMERSET, ss

SUPERIOR COURT
Docket No. CV-9240

CAROLL W. COLFORD,
Plaintiff

vs.

CHUBB LIFE INSURANCE COMPANY,
Defendant

OPINION AND ORDER

This matter is before the Court on the Defendant's Motion for Judgment as a Matter of Law Pursuant to Rule 50(b) and Motion for a New Trial Pursuant to Rule 59 filed on October 14, 1994. Oral argument was held on these motions on November 9, 1994 and the Court has considered the memoranda of the party [sic] and the portions of the record submitted for consideration.

The motions pertain to the judgment entered by the clerk at the Court's direction on October 4, 1994. The judgment itself arose from jury verdicts returned separately on June 17, 1994, and June 23, 1994, and the findings made by the Court as the result of a hearing on July 27, 1994. Plaintiff was awarded $1,465,356.00 plus interest and costs on Count I of his complaint and $24,502,000.00 plus interest and costs on Count III of his complaint.

DISCUSSION

The Court will first address the Motion for Judgment as a Matter of Law as it pertains to Count III of the complaint, intentional infliction of emotional distress. Both plaintiff and

defendant agree with the proposition that the fact that an insurer breaches a contract with its insured does not preclude a finding of intentional infliction of emotional distress based on other conduct. Furthermore both sides agree that a claim for emotional distress must be examined in the context of the relationship between the parties, including their relationship as insurer and insured. However, under controlling Maine law it is incumbent upon the Plaintiff to prove outrageous conduct over and above a bad faith breach of the insurance contract in order to support an independent tort claim. *Marquis v. Farm Family Mutual Insurance Company*, 628 A.2d 644 (Me. 1993).

The issue for this Court is whether there was "sufficient actionable misconduct" over and above a bad faith breach of the insurance contract to support the jury's finding against Chubb. *Borden v. The Paul Revere Life Insurance Company*, 935 F.2d 370 at 385 (1st Cir. 1991).[1] The Plaintiff was given every opportunity to present evidence concerning the Chubb pattern of conduct in this case, the relationship between the parties, and the known (or knowable) susceptibility of the Plaintiff. These are the three factors which the jury should consider in making its

---

[1] In the *Borden* case the jury was free to consider the bad faith breach of the insurer in making its determination of outrageousness because under Rhode Island law the common law tort of bad faith is recognized. However that recognition does not help the analysis in this case because in *Borden* the jury found there was no bad faith on the part of the insurance company. In the present case the jury did find that the insurance company breached the *contractually* implied covenant of good faith and fair dealing. There does not appear to be any reason that the jury could not have considered that factor as one aspect of the relationship between the parties in making its assessment of atrocious and outrageous conduct.

determination of whether the actions of a defendant "go beyond [the] bounds of decency" so as "to be regarded as atrocious" according to Restatement (Second) of Torts § 46, comment (d).

The conduct in this case which is outside the bad faith breach of the insurance contract is minimal. There was simply nothing outrageous about a Chubb representative attending a public worker's compensation hearing nor was there anything outrageous about not renewing Mr. Colford's SEC license (assuming that conduct can be attributed to Chubb Life) when Mr. Colford by his own admission was disabled and unable to use that license.

The record is unclear about whether a representative of the company actually told Mr. Colford that the company was "out to get him". However, if that evidence is present in the record it does little to develop a pattern of "outrageous conduct". The alleged statement, like the inference that maybe [sic] drawn from the assertion of the attorney/client privilege by Chubb's representatives when questioned about why they discontinued Mr. Colford's waiver of premium on his separate life insurance policy, is evidence which a factfinder might consider in evaluating the intentional or reckless nature of Chubb's conduct or the degree of ill will toward Mr. Colford, but the conduct itself is clearly not "outrageous as to exceed all possible bounds of decency."

The most outrageous conduct attributed to Chubb was the Wolfe letter wherein the Defendant attempted to deny the very existence of an insurance contract between the Plaintiff and the Defendant. That conduct, however, has been characterized by the Defendant as part of the dispute over the meaning of the contractual language. While Mr. Wolfe's choice of words may have been unfortunate, it is not outrageous conduct for the company to dispute the meaning of contract terms. If Mr.

Wolfe's letter had stated that the company was not paying Mr. Colford's claim because the Company did not believe he had been accepted for the policy under the plan, benefits, and amounts applied for, it would be much easier to see the Wolfe letter as articulating a contractual dispute. However, by suggesting that Mr. Colford did not have coverage because of a change in his health status (i.e. he had an accident), Wolfe's letter suggested that the company was trying "to get rid" of Mr. Colford to avoid paying a claim. The jury understandably found such to be Wolfe's intent when they answered question #1 on the verdict form and concluded that Chubb did not act in good faith in its initial denial of coverage.

However, our Law Court has said that if that dispute is undertaken in bad faith as the jury found to be the case in this incident there is no independent actionable tortious conduct based solely upon that bad faith. *Marquis*, supra. The issue for this Court now is whether all of this conduct taken together and put in the context of Mr. Colford's disabled condition and reliance upon his insurance for protection rises to the level of conduct so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable so as to constitute the recognized common law tort of intentional infliction of emotional distress. The First Circuit, in *Borden v. Paul Revere Life Insurance Company*, supra at p. 380, found somewhat similar conduct to "fall reasonably close to the line" and ruled the question was for the jury. Our Law Court in *Staples v. Bangor Hydro-Electric Co.*, 561 A.2d 499 (Me. 1989) said that conduct by an employer against an employee such as humiliating Plaintiff publicly, demoting him without cause, and committing slander *per se* against him falls far short of the extreme and outrageous conduct required to be actionable as intentional infliction of emotional distress and affirmed the Court's summary judgment in Defendant's favor.

On the other hand in *Latremore v. Latremore*, 584 A.2d 626 (Me. 1990) in the context of a contractual dispute between a son and his parents over the meaning of certain lease terms the Court found that threatening to evict the parents, making vicious remarks about the father's mental condition, and demanding $3,000.00 per month as rental payments was ample evidence to support the jury's finding that the conduct was extreme and outrageous so as to be actionable. Although Chubb suggests that its conduct is distinguishable from the Paul Revere Company's conduct because Mr. Colford never relied upon Wolfe's representations regarding the lack of insurance, the *Latremore* case seems to suggest that the absence of reliance upon the representations of the party inflicting emotional distress is not a factor making the conduct unactionable.

Like Circuit Judge Campbell, concurring Dubitante in the *Borden* decision, "I am, nonetheless, troubled" by the legal conclusion that there is sufficient actionable misconduct in this case to support the jury's finding of intentional infliction of emotional distress against Chubb. This Court's legal conclusion was that Chubb breached its contract of insurance with Mr. Colford and in the jury's view that breach was committed in bad faith. None of Chubb's conduct after the commencement of this litigation was outrageous or intolerable. There was a legal basis for the actions undertaken by Chubb and the defenses raised. Relying primarily upon the decision in *Staples*, supra, this Court is satisfied that this conduct does not rise to the level of actionable conduct for the infliction of emotional distress.

The Court allowed the emotional distress claim and the punitive damage claim that logically flowed from it to go to the jury because it was clear that in light of Chubb's defensive claims of lack of disability and fraud on the part of Mr. Colford very little additional evidence would be presented to the jury. In the event this Court is incorrect about the level of conduct required

under the intentional tort, the jury's verdict can be reinstated or if the verdict is deemed excessive the reviewing Court can itself adjust the amount of the damage award. *Phillips v. Eastern Maine Medical Center*, 565 A.2d 306 at 309 (Me. 1989). However, I am satisfied after reviewing the entire record fully and completely developed in this case that under Maine law the conduct at issue does not fall reasonably close to the line, but rather falls outside the line and is not actionable as an independent tort. While the Court must accord great respect to the jury's verdict, if that verdict was based upon insufficient evidence of actionable misconduct it cannot be allowed to stand. Based upon that conclusion judgment will be entered for the Defendant on Count III of the complaint.

Turning now the [sic] Chubb's Motion for New Trial and/or Motion for Judgment as a Matter of Law as it pertains to Count I, the Court made findings at the time of its order directing the entry of judgment pertaining to the contractual issues and does not intend to reconsider those issues now. However, the issue of the award of $1,000,000.00 in consequential damages does merit further discussion.

The problem with the $1,000,000.00 damage award is not a lack of evidence in the record to support the amount of prospective damages. Mr. Goldstein testified to his economic theories and the jury accepted them. Likewise, the jury was persuaded by evidence that if Mr. Colford had $2,000.00 per month in disability payments he would have been able to preserve his real estate investment which was valued at $287,000.00. The Court's concern is not the lack of evidence in the record on those two points, but rather whether the jury may have acted under a mistake of law when they reached their verdict. *Poulette v. Herbert C. Haynes, Inc.*, 347 A.2d 596, 599 (Me. 1975).

As Plaintiff points out in his memorandum at page 49, Dr. Goldstein's "calculations of prospective lost profits did not begin until the year 2005." It is not logical that the correct legal measure of contract damages for loss of a $287,000.00 income producing asset would be prospective lost profits commencing eleven years in the future. If another comparable rental property with a value of $287,000.00 is purchased by Mr. Colford he is returned to the same position that existed had there not been a breach. There is no legal reason to calculate prospective lost profits because Mr. Colford has the ability to generate those profits with the newly acquired asset and he is made whole.

This Court's rationale for granting judgment as a matter of law as to those consequential damages in excess of $352,000.00 (the $287,000.00 representing the value of the property and $65,000.00 representing foreclosure and attorney's fees) does not fully address Chubb's argument that awarding Mr. Colford both the $2,000.00 per month benefit and the value of the lost real estate amounts to a double recovery. Clearly under Plaintiff's theory he would have expended the $2,000.00 monthly benefit on the property mortgage for the next 11 years and would not have had that money available. Under the Court's judgment Mr. Colford recovers his contract damages and the consequential damages the jury found to have arisen from the breach.

While this recovery may put Mr. Colford in a better financial posture than he would have been had Chubb not breached its contract, it also insures that Chubb reimburses Mr. Colford fully and completely for damage which the jury found as a fact to have been a direct consequence of Defendant's breach. Furthermore Chubb's argument that Goldstein's [sic] future lost profits are too speculative is rendered moot by the Court's theory of recoverable damages because as a matter of law Mr. Colford's damages are limited to the value of the asset lost and direct expenditures already incurred as a result of that loss. Unlike the

Marquis case, supra, the lost profits in this case do not begin to accrue until 11 years after judgment or 14 years after the breach. By recovery of the lost asset or its equivalent value now, Mr. Colford has not lost future profits, but rather has been given a direct opportunity to earn those profits.

As to the "rank speculation" by Goldstein as to what reasonable banks would have done in terms of accepting payment, the jury was obviously persuaded by this essentially unchallenged testimony. This Court will not set aside that finding.

Based on the foregoing, entry will be:
Defendant's Motion for Judgment as a Matter of Law as to Count III, intentional infliction of emotional distress and punitive damages is **GRANTED**. Judgment is entered for the Defendant, Chubb Life Insurance on Count III. Motion for Judgment as a Matter of Law as to Count I is **GRANTED-In-PART**. The judgment entered in favor of Carroll Colford on that count is amended to reflect a total judgment of $817,356.00, which consists of $465,356.00 in contract damages and $352,000.00 in consequential damages, plus interest and $31,932.65 in costs.

December 7, 1994

/s/ Margaret J. Kravchuk
Margaret J. Kravchuk
Justice, Superior Court

STATE OF MAINE
SOMERSET, ss

SUPERIOR COURT
Docket No. CV-92-40

CAROLL W. COLFORD,
Plaintiff

vs.

JUDGMENT

CHUBB LIFE INSURANCE COMPANY OF AMERICA,
Defendant

BACKGROUND

This matter was tried before a jury in Somerset County on June 6-17, 1994 on the Plaintiff's Fourth Amended Complaint which consisted of three counts, Breach of Insurance Contract (Count I), Intentional Infliction of Emotional Distress (including punitive damages) (Count III), and Negligent Infliction of Emotional distress (Count IV). Count II had previously been dismissed by the Court on the Third Amended Complaint and Count IV was dismissed at the close of the Plaintiff's case, leaving two counts which were submitted to the jury.

On May 26, 1994, a pre-trial hearing was held and the Plaintiff renewed his request for partial summary judgment on the question of the existence of the contract of insurance and the breach of the same by the Defendant. While Defendant agreed that the meaning of the contract term was unambiguous and a question of law for the Court's determination, it objected to the entry of summary judgment because of the alleged factual disputes over whether Mr. Colford was acceptable under the company's rules for the plan, benefits, and amount of insurance requested, even in the absence of fraud. Furthermore, the Company agreed that even if the Court interpreted the contract

language in its favor and determined that it was an "insurability" contract rather than "temporary insurance", the issue of good faith denial of coverage would exist as a factual question. [See *Palmer v. Mutual Life Ins. Co. of New York*, 324 F. Supp. 254 at 258 (Me.,) 1971]. Therefore, over the Plaintiff's objection, the Court declined to grant summary judgment and indicated that those factual questions would be submitted to the jury.

The parties further agreed, prior to the commencement of trial, that if the jury found that Mr. Colford was eligible for the contract benefits, the actual computation of the present value of those benefits was a factual matter that would be tried to the Court. [Transcript, June 6, 1994]. Thus the jury was asked to consider consequential damages, but they were not asked to compute the policy value of the monthly disability benefit payments in the event that they found Mr. Colford to be disabled and not to have made material misrepresentations in the procurement of this insurance policy.

The Court also indicated, by way of pre-trial ruling, that any question of punitive damages would be limited to Count III (Intentional Infliction of Emotional Distress) and would only be presented to the jury in the event that there was a factual finding that Defendant had engaged in the type of extreme and outrageous conduct which would give rise to such a cause of action. The jury did respond affirmatively to the relevant interrogatories and a subsequent hearing on punitive damages was held before the same jury panel on June 23, 1994. [See Tr. of March 10, 1994, pre-trial hearing, pp. 49-54].

On July 27, 1994, this Court heart testimony from various witnesses regarding the present value of the disability policy benefits. At the conclusion of that hearing the Court made certain factual findings which form the basis of the Court's

conclusion regarding the present value of those benefits and the appropriate method of payment under the facts of this case.

It is now incumbent upon the Court to direct the appropriate entry of judgment under Rule 58, Me. Rules Civil Procedure. This judgment is entered based upon the jury's answers to interrogatories and verdict and the Court's findings of fact and conclusions of law.

BREACH OF INSURANCE CONTRACT
COUNT I

This Court has concluded as a matter of law that the "conditional receipt" issued in this case by Defendant, Chubb Life Insurance Company of America, was a contract of temporary insurance. The receipt was clearly an "approval" type of receipt rather than an "insurable" type of receipt. The distinction is set forth in *Palmer v. Mutual Life Insurance Company of New York*, supra. The language of the contract does not make reference to insurability or even that the applicant must be a "standard risk" for the policy. The contractual requirement is simply that he be acceptable under company rules for standard rates for the plan, benefits, and amounts applied for.

There is absolutely no evidence to support the Defendant's position that Mr. Colford was not eligible under standard rates for the plan. In fact the evidence is uncontroverted that Mr. Colford was offered "permanent" insurance under standard rates for the Professional Protector Plan before the underwriting department learned of his fall. That offer was withdrawn when the underwriter learned that Mr. Colford had fallen.

However Defendant's position is that Mr. Colford was not eligible under standard rates for the benefits and/or amounts

applied for and that therefore the "temporary insurance" contract was not in effect at the time of his accident. Over the Plaintiff's objection the Court submitted to the jury Defendant's Special Interrogatory # 2 asking them to make a factual determination of whether the Plaintiff was eligible for the "amount" of disability benefit he applied for, in the absence of any fraudulent misrepresentation on his part.

The jury heard conflicting testimony about the amount of Mr. Colford's income and his eligibility status. However Carol Frost, one of Plaintiff's witnesses and Defendant's own employee, agreed that Colford was probably eligible for the $2,000.00 monthly benefit, using the $57,000.00 net annual income listed in Plaintiff's 1990 Schedule C return. Thus there was evidence to support the jury's determination that he was eligible for the "amount" applied for under the company's rules and for the Court to accept that determination.

The final legal issue concerned whether the "temporary insurance" policy was void because Mr. Colford was not eligible under standard rates for the benefits applied for. The company argued that because the "permanent insurance" offered by the company contained a [sic] exclusionary rider pertaining to Mr. Colford's back and did not offer the "own-occupation" rider he had applied for, he was not eligible under standard rates for the benefits applied for.

The Court notes first that the evidence at trial suggested that the company's rules would prefer that the underwriter "rate" an applicant such as Mr. Colford who had a history of back problems. Thus he would not be eligible for standard rates. However, the uncontroverted evidence at trial was that the underwriter did not "rate" Mr. Colford with a special rate, but rather offered him "permanent insurance" with the back exclusion. Mr. Colford, as a matter of law, was accepted under

standard rates, but at the expiration of the "temporary" policy his policy would have included an exclusion for his back. The exclusion did not negate his acceptance under standard rates of the benefits, it simply modified the extent of the coverage provided by the company.

The same rationale applies to the "own-occupation" rider. The company's decision to offer "permanent" insurance without the "own-occupation" rider did not in any way make Mr. Colford ineligible *under standard rates* for benefits applied for. The conditional receipt did not contain the *Palmer* language requiring the proposed insured to be eligible for the policy exactly "as applied for". There is no legal reason why the company's unwillingness to ultimately issue a policy with an "own-occupation" rider should void the temporary contract it previously issued.

The Company might have argued that the conditional receipt was subject to the terms and conditions of the policy applied for, as the language of the contract indicates. That policy, when finally offered to Mr. Colford, had an exclusionary rider pertaining to his back and did not contain the own-occupation rider. Therefore it might have been argued that Mr. Colford's lower back was not covered under the conditional receipt nor did he have an "own-occupation" rider. The Plaintiff, of course, strongly argues that during the term of the "temporary insurance" the Defendant is bound to provide the full coverage granted by the contract. Those questions are coverage questions which would have been determined as a mater of law by the Court. However, Chubb took the position that the original contract was void because of the final policy terms offered by Chubb. Those terms had nothing to do with Mr. Colford's acceptability *under standard rates*.

The jury rendered its opinion that Chubb determined that the contract was void not because of legitimate business disputes over the extent of the coverage, but rather in bad faith because it had learned of Mr. Colford's accident. [Interrogatory #1, included in special verdict form at Defendant's request and over Plaintiff's objection]. The letter written by the underwriting department at the time their offer of insurance was withdrawn supports this conclusion. At that point in time the company had no reason to believe that Colford was ineligible for the "amount applied for" and they had already offered a policy of insurance to be issued under standard rates.

Based upon the foregoing legal conclusions and the jury's factual findings under questions #1, #2, #3, #4 and #4A, the Court concludes that judgment should be entered for the Plaintiff on Count I of the complaint. The remaining issue concerns the amount of the damage award under Count I. The components of damages include both general damages under the contract and consequential damages as allowed by the Law Court in *Marquis v. Farm Family Mutual Insurance Company*, 628 A.2d 644 (Me. 1993).

In the present case the jury determined that Mr. Colford suffered consequential economic damages in the amount of $1,000,000.00 due to the foreclosure sale of certain real estate holdings. The Plaintiff's position was that he lost these properties because he was unable to make monthly mortgage payments in the approximate amount of $2,000.00, the same amount as the disability benefit payment denied to him by Chubb. Plaintiff's expert then testified that the Plaintiff's economic loss was based not upon the value of the property, but upon the loss of future income. The expert testified that the amount of future loss could be fixed with economic certainty at $1,000,000.00, the amount awarded by the jury.

While the Court is troubled by the speculative nature of the economic testimony both in regard to causation and amount of damages, there was evidence in the record to support the jury's decision. "It is not for [this] court to interfere merely because the award is large, or because the court would have awarded less." *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117, 122 (Me. 1970). Therefore part of the damage award under Count I will include the $1,000,000.00 in consequential damages.

The second component of contract damages is the present value of the monthly disability benefits awarded as a lump sum. Defendant Chubb, after the trial of this matter, raised for the first time the question of whether Mr. Colford was only entitled to the policy benefits accrued as of the date of the judgment and then to monthly payments in the amount of $2,000.00 for as long as he remains disabled. In a memorandum filed July 18, 1994, Chubb first raised this issue and cited persuasive case law in support of such an approach.

As Chubb acknowledges in its memorandum, Plaintiff had initially requested that he only be awarded disability income accrued to date and that Chubb then be ordered to continue payments under the policy until benefits are exhausted or plaintiff otherwise becomes ineligible. Chubb took the position that no contract existed and that Mr. Colford's disability, whether permanent, temporary, total or partial, was irrelevant. Chubb also took the position that if the Court determined as a matter of law that a contract existed, Mr. Colford was not disabled and that therefore Chubb owed him no benefit payments.

By the March 10, 1994, pre-trial conference, Plaintiff made clear that his position was not to ask the Court to put the policy into effect, but rather to ask for damages flowing from both Chubb's prior conduct and from its anticipatory breach of

the policy into the future. [Tr. of March 10, 1994, pre-trial hearing at p. 54]. Therefore Mr. Colford was seeking a lump sum reduced to present value, taking into account all of the policy terms, including cost of living provisions and so forth. Chubb acknowledged this fact and agreed that those issues would be tried to the Court, including any factual dispute arising from how the calculations should be performed. [Tr. of June 6, 1994, pre-trial hearing at pp. 4-5]. Obviously if the damages were only accrued damages as of the date of hearing and future monthly payments of $2,000.00 per month the computation of policy benefits is not "convoluted" at all. [See Tr. of pre-trial proceedings, June 6, 1994, p. 4, Mr. Druary speaking].

Furthermore the Court, at the request of Defendant Chubb, submitted to the jury the question of whether Mr. Colford's disability was temporary or permanent. If Chubb's position had been that a factual determination of permanent disability was too speculative, then Defendant should not have requested that fact submitted to the jury. Chubb did not ask the Court to inquire of the jury only whether Mr. Colford was *currently* disabled. If their position had been that he was only entitled to benefits accrued up to the date of trial and $2,000.00 per month thereafter, the interrogatory should have been designed with that position in mind.

Contrary to Chubb's position in its memorandum filed September 19, 1994, the jury was not allowed to consider Mr. Colford's receipt of social security disability payments as evidence that he was permanently disabled. They were specifically instructed not to do so. Furthermore, counsel for the Defendant indicated that as part of his claim that Mr. Colford's conduct was fraudulent he intended to introduce evidence of the money Mr. Colford had already received for this injury from worker's compensation, social security, another disability policy,

and a potential recovery in a suit against the owner of the premises where he fell.

In computing damages the Court has allowed for the actuarial possibility that Mr. Colford could return to work in the future by accepting Chubb's theory regarding a morbidity factor which reduces the present value of the award. Under the facts of this case this Court is satisfied that Chubb has waived any other aspect of its challenge to a lump sum payment through its silence and assent to the procedure adopted by the Court with the consent of both parties. Although fully aware of the procedure intended to be followed at the July 27th hearing, Chubb never once even remotely suggested that a lump sum payment was inappropriate until nine days prior to that hearing. The Court and both parties went to trial with the explicit understanding that if Mr. Colford was entitled to recover under this contract, the recovery would be in the nature of a lump sum. Chubb is now attempting to change the rules after the fact.

Regarding the calculation of the present value of the lump sum payment of benefits to Mr. Colford, the Court heard conflicting testimony at the hearing conducted in late July, 1994. At the conclusion of that hearing the Court made factual findings on the record and directed that Defendant Chubb recompute the present value using its methodology but substituting different figures for the growth rate and the discount rate. After the hearing Plaintiff submitted written objections to Chubb's methodology. The Court has decided this issue solely on the evidence presented at the hearing and its findings are on the record of that hearing. Based upon the updated figures submitted by Defendant Chubb, the damages under the contract are $465,356.00 . Thus the total damage aware to Plaintiff under Count I of the complaint is $1,465,356.00, plus interest and costs.

COUNT III
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

PUNITIVE DAMAGES

On March 23, 1993, another justice of this Court denied Plaintiff leave to amend his complaint to add a count for violation of 24-A M.R.S.A. Sec. 2436. However, a count alleging intentional infliction of emotional distress was part of the complaint and remained part of the complaint up to and including the date of trial. This justice initially denied Plaintiff's request to amend its complaint and add a request for punitive damages under the intentional tort count. This second request for punitive damages was based on a different cause of action than the punitive damage count dismissed with prejudice by another justice on June 30, 1992. However, by order dated March 18, 1994, this Court reversed itself and allowed an amendment of the pleadings to add a request for punitive damages arising out of the intentional tort count.

The Court allowed this amendment as no additional evidence would need to be presented to the jury during the first phase of the trial and no additional discovery would be allowed. [Tr., March 10, 1994, pp. 38-41]. If Plaintiff met his burden of establishing an intentional tort, it could well mean that evidence of malice to the standard of clear and convincing evidence had been presented as well. It was therefore appropriate that Plaintiff's pleading contain an allegation which sought damages for such conduct.

At the conclusion of Plaintiff's case, the Court denied the motion for judgment as a matter of law on Count III, giving the Defendant leave to renew the motion at the close of all evidence or after verdict. While the Court had, and continues to have,

substantial concern about the sufficiency of the evidence to support a finding of intentional infliction of emotional distress, let alone clear and convincing evidence of malice, there were certain factors present in the case that suggested it was appropriate to submit those questions to a jury.

Those factors included Mr. Colford's testimony that a representative of Chubb told him in a telephone conversation that the company was "out to get him." He also testified that the company's representatives had caused revocation of his license to sell securities and bonds through the SEC and had attempted to interfere with his worker's compensation claim. It appeared the Plaintiff was attempting to suggest that Chubb's intentional conduct went beyond a mere contractual dispute. He and his physician also testified to certain physical manifestations which were alleged to have been caused by the emotional distress. Applying the rule in "Reed's Case" [*Reed v. Rule*, 376 A.2d 445 (Me. 1977)], the Court could not find that the correctness of directing a verdict on this count appeared so clear that all reasonable doubts of possible error or uncertainty had been removed. Therefore the Court allowed the count to go to the jury pursuant to the provisions for renewal of the motion under Rule 50, Me. Rules of Civil Procedure.

Much of Chubb's conduct which allegedly caused Plaintiff's severe emotional distress, i.e. Chubb's position that Mr. Colford did not qualify for the amount of insurance applied for and the company's position that Mr. Colford was not permanently disabled, was based upon its legitimate dispute over evidence admitted at trial. In this Court's view the Defendant's contractual dispute with Mr. Colford over the meaning of certain terms in the conditional receipt should not in and of itself form the basis of a claim that Defendant's conduct was "so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized

community." Perhaps the additional conduct alluded to in the preceding paragraph could form the basis of such a claim if there were sufficient evidence in the record to support such allegations.

Although Defendant has filed a letter request for reconsideration of the denial of the motion for judgment as a matter of law made at the close of the Plaintiff's case, the motion has never been formally renewed. On Plaintiff's motion the letter request for reconsideration was stricken from the record because it did not comply with the Rules of Civil Procedure. Such a motion may be renewed at any time up to 10 days after the entry of judgment and the Court will entertain any such motion filed by Defendant during that time period. At this time the Court believes it must direct the Clerk to enter judgment in accordance with the jury's verdict on Count III.

Based upon the foregoing findings of fact, conclusions of law, jury answers to special interrogatories, and the verdict returned by the jury, the Clerk is directed to enter a judgment pursuant to Rule 58 as follows:

COUNT I:

Judgment for the Plaintiff, Carroll W. Colford, in the amount of $1,465,356.00, plus interest and costs.

COUNT II:

Judgment for the Plaintiff in the amount of $500,000.00 compensatory damages and $24,002,000.00 punitive damages, plus interest and costs.

DATE:

October 4, 1994 /s/ Margaret J. Kravchuk
Margaret J. Kravchuk, Justice
Superior Court

Supreme Court, U.S.
FILED
MAY 7 1997
CLERK

No. 96-1589

In The

Supreme Court of the United States

October Term, 1996

CARROLL W. COLFORD,

Petitioner,

v.

CHUBB LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. KAYATTA
(*Counsel of Record*)
JARED S. DES ROSIERS
PIERCE ATWOOD
One Monument Square
Portland, ME 04101-1110
Tel: (207) 791-1100

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondent Chubb Life Insurance Company of America ("Chubb") states that its current parent company is The Chubb Corporation. Pursuant to a Purchase and Sale Agreement dated February 23, 1997, it is expected that the Jefferson-Pilot Corporation will purchase Chubb in the near future. Chubb has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS TO DENY THE PETITION 7

I. This Case Is Simply A Matter Of Maine State Tort Law 7

II. The "Inadequate State Ground" Exception Provides No Basis To The Court To Review This State Law Decision 8

A. The *Howlett* line of cases provides no basis for jurisdiction 9

1. The *Howlett* line of cases involves the use of state law to defeat the assertion of a federal right 9

2. In seeking punitive damages, Colford asserted no federal right 11

B. The Maine Law Court's decision is fairly and substantially supported by existing Maine precedent 12

C. It is the recommended practice in Maine for trial courts in close cases to allow the case to go to the jury and then if the verdict is not supported by sufficient evidence to enter judgment as a matter of law 14

III. Colford's Petition Is Based On Several Mischaracterizations And Omissions Of The Record 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Bedard v. Pellon, 606 A.2d 205 (Me. 1992) 14

BMW of North America, Inc. v. Gore, 517 U.S. ___, 134 L.Ed.2d 809 (1996) 9, 11

Chiapetta v. Lumbermens Mutual Ins. Co., 583 A.2d 198 (Me. 1990) 13

Colford v. Chubb Life Ins. Co. of America, 687 A.2d 609 (Me. 1996) ..... *passim*

Currier v. Toys 'R' Us, Inc., 680 A.2d 453 (Me. 1996) 14

Gray v. State of Maine, 624 A.2d 479 (Me. 1993) 14

Howlett v. Rose, 496 U.S. 356 (1990) 9, 12

Marquis v. Farm Family Mutual Ins. Co., 628 A.2d 644 (Me. 1993) 17

Moore v. Fenton, 289 A.2d 698 (Me. 1972) 14

Reed v. Rule, 376 A.2d 445 (Me. 1977) 14

Rubin v. Matthews Int'l Corp., 503 A.2d 694 (Me. 1986) 13

Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) 11

Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1987) 4, 6

West v. American Tele. & Tele. Co., 311 U.S. 223 (1940) 8

CONSTITUTIONAL & STATUTORY PROVISIONS:

U.S. Const. amend. XIV § 1 ..... 9, 11

U.S. Const. amend. IV 9

TABLE OF AUTHORITIES – Continued

Page

N.H. Rev. Stat. Ann. § 507:16 11

28 U.S.C. § 1254(1) 7

28 U.S.C. § 1257(a) 7, 10

U.S. Sup. Ct. R. 15(2) 15

OTHER SOURCES:

Alfred Hill, *The Inadequate State Ground*, 65 Columbia L. Rev. 943 (1965) 10

Restatement (Second) of Torts, § 46, cmt. d 4

Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043 (1977) 10

STATEMENT OF THE CASE

In this case arising out of a dispute concerning the denial of benefits under a disability insurance policy applied for by Petitioner Carroll W. Colford, Colford received a jury verdict for compensatory and punitive damages against Respondent Chubb Life Insurance Company of America ("Chubb") on a claim for intentional infliction of emotional distress. Relying on settled Maine case law defining the elements of the tort of intentional infliction of emotional distress, the trial court set aside the verdict on the grounds that the evidence, even as viewed most favorably to Colford, did not satisfy the necessary elements of the tort as a matter of Maine law. Thereafter, the Maine Supreme Judicial Court sitting as the Law Court (hereinafter the "Law Court") unanimously affirmed the trial court's entry of a judgment as a matter of law on Colford's intentional infliction claim, thus conclusively taking away Colford's verdict as a matter of Maine law. *See Colford v. Chubb Life Ins. Co. of America*, 687 A.2d 609 (Me. 1996). Unable to accept this application of Maine law, Colford now petitions this Court for a writ of certiorari in an attempt to reinstate his verdict.

Colford's intentional infliction of emotional distress claim arose as part of a dispute he had with Chubb concerning whether he was entitled to disability benefits

under a disability insurance conditional receipt he executed on April 22, 1991. On that date, with his son acting as agent, Colford, a Chubb agent himself, completed an application and a conditional receipt for disability insurance coverage from Chubb. The conditional receipt contained certain conditions that had to be met in order for Chubb to be obligated to provide insurance coverage while the application for permanent coverage was being processed.

Within the next two weeks, Colford reported to a doctor that he had fallen down a flight of stairs on April 30, 1991 and injured his back. While a series of subsequent exams by neurologists showed that Colford was completely normal from a neurological standpoint, he nevertheless continued to report pain involving his cervical and lumbar spine. Colford did not immediately report his injury to Chubb. In the meantime, Chubb, completely unaware of Colford's injury, determined that Colford did not satisfy all of the conditions included in the conditional receipt and instead on May 20, 1991 offered Colford a different policy for which he would qualify.

Fifteen days later, on June 4, 1991, Chubb received from Colford its first notice of the April 30 injury. On June 6, 1991, now informed of the back injury, Chubb withdrew its May 20 offer of the other coverage, which Colford had not yet accepted. Four days later, on June 10, Colford wrote Chubb purporting to accept Chubb's May 20 offer. On the same day, Chubb denied Colford's claim for the April 20 injury due to lack of coverage.

Thereafter, Colford filed suit alleging breach of contract and several tort claims against Chubb. Three claims

went to trial: a breach of contract claim for failure to pay disability insurance; a claim for intentional infliction of emotional distress and a claim for negligent infliction of emotional distress.[1] With the agreement of the parties, the trial court retained for itself the issue of interpreting the conditional receipt. All other claims were tried to the jury.

Colford based his claim for intentional infliction of emotional distress on certain conduct by Chubb in handling and investigating his disability claim. Specifically, he offered evidence that: Chubb wrongly denied his disability claim; Chubb sent him to a board certified neurologist for an independent medical exam who, according to Colford, was sarcastic, rude and indifferent to his personal comfort; Chubb's defense attorney attended a worker's compensation hearing on Colford's worker's compensation claim and passed notes to the attorney representing the worker's compensation insurer; Chubb Securities informed the SEC that Colford voluntarily terminated his brokerage license; and Chubb, after initially granting a waiver but later learning that a doctor found him not totally disabled, stopped Colford's disability premium waiver on his life insurance policy. Colford argued that this conduct on Chubb's part met the established standard for the tort of intentional infliction of emotional distress under Maine law, i.e., that the tortfeasor's conduct be "so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and . . . be regarded as

---

[1] The trial court entered judgment as a matter of law on Colford's negligent infliction claim. Colford did not appeal this ruling below.

'atrocious and utterly intolerable in a civilized community.'" *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1987) (quoting *Restatement (Second) of Torts*, § 46, cmt. d).

At the conclusion of the evidence, the trial court informed counsel that it intended to rule in favor of Colford on the conditional receipt issue. Prior to the case going to the jury, Chubb renewed its pretrial argument that, as a matter of law, there was no basis for the tort claim of intentional infliction of emotional distress, and thus no basis as well for punitive damages. Although expressing considerable doubt that Colford had produced evidence of intentional infliction of emotional distress, the trial court denied the motion and let the tort claim go to the jury subject to Chubb's right to renew its motion post-verdict should the jury decide in favor of Colford.

The jury found that Chubb was guilty of intentional infliction of emotional distress and awarded Colford $500,000 in compensatory damages. The jury also found that Chubb had acted with malice, the requirement under Maine law for the awarding of punitive damages. The trial then reconvened on the issue of punitive damages. After hearing evidence of Chubb's financial condition, the jury awarded Colford punitive damages totaling $24,002,000.

After rejecting a timely motion for judgment as a matter of law on the conditional receipt issue, the trial court on October 4, 1994 entered judgment for Colford in the amount of $1,465,356 on the conditional receipt issue. Appendix ("A.") 38a. At the same time, the trial court entered judgment for Colford on the intentional infliction

claim in the amount of $500,000 compensatory damages, and $24,002,000 punitive damages, plus interest and costs. A. 38a. The trial court in its Judgment reiterated its "substantial concern about the sufficiency of the evidence to support a finding of intentional infliction of emotional distress." A. 36a-37a. The trial court also made clear Chubb's right to file a motion for judgment as a matter of law within ten days of the entry of judgment on this issue. A. 38a.

Chubb in a timely fashion exercised that right and filed a motion for judgment as a matter of law. After carefully considering the evidence Colford presented at trial concerning Chubb's alleged tortious acts, the trial court issued an Opinion and Order granting in part Chubb's motion, finding that, under established Maine common law principles, Chubb's "conduct does not rise to the level of actionable conduct for the infliction of emotional distress" and that, therefore, there was insufficient evidence to support the verdict in favor of Colford on his intentional infliction claim. As a result, the trial court set aside the compensatory and punitive damages award on this tort claim. Thereafter, Chubb timely appealed the judgment on the breach of contract issue and Colford cross-appealed on the tort issue.

On appeal, the Law Court reversed the trial court on the breach of contract claim, finding that Colford had not satisfied the conditions precedent to coverage under the conditional receipt. The Law Court at the same time affirmed the trial court's judgment as a matter of Maine law on Colford's intentional infliction claim. After considering the evidence presented as to each of the acts on

Chubb's part that Colford argued were tortious, the Law Court stated:

> [Colford] must demonstrate that Chubb's actions arose independently of its denial of the disability claim, were intentionally or recklessly inflicted, and were so 'extreme and outrageous' as to exceed 'all possible bounds of decency,' and be regarded as 'atrocious' and utterly intolerable in our civilized society. *Vicnire*, 401 A.2d at 154. This attitude and conduct of the physician who examined Colford, on this record, cannot be attributed to Chubb. Chubb's attorney's attendance at the workers' compensation hearing and communication with one of the attorneys for the employer's insurer does not constitute the kind of conduct that supports a cause of action in tort for intentional infliction of emotional distress. Neither do Chubb's actions concerning Colford's securities registration and Colford's life insurance premiums rise to the level of extreme and outrageous, or exceed all possible bounds of decency. Nor do they support a verdict of punitive damages.

Colford, 687 A.2d at 617.

Colford now petitions this Court for a writ of certiorari to review this decision by Maine's highest court that Colford's evidence did not satisfy the requirements of the tort of intentional infliction of emotional distress under the common law of the State of Maine.

REASONS TO DENY THE PETITION

In his Petition, Colford invokes jurisdiction under 28 U.S.C. § 1254(1). This provision concerns jurisdiction on appeals from the courts of appeals. Colford must instead have in mind section 1257, which provides jurisdiction to review the final judgment rendered by the highest state court in cases where the validity of a federal treaty or statute is questioned, where a state statute is repugnant to the federal Constitution, treaty or law or where "any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." *See* 28 U.S.C. § 1257(a). Given the total absence of a federal claim by Colford, this Court would appear to have no jurisdiction under this statute.

Colford asserts no "title, right, privilege or immunity" under the Constitution or laws of the United States. Instead, he asks this Court to do what it cannot do: review a decision by Maine's highest court ruling that the evidence Colford presented failed to support the state law claim he brought. The fact that the state law decision rejecting Colford's state law claim avoided the need to address an alternative constitutional defense raised by Chubb is simply irrelevant to the adequacy of the Petition, and provides no basis for jurisdiction.

I. This Case Is Simply A Matter Of Maine State Tort Law.

Even a cursory reading of the Law Court's opinion shows that no issue of federal statutory or Constitutional law was decided in this case. In its opinion, the Law

Court does not even cite a federal statute or Constitutional provision.

The decision instead involves solely issues of Maine contract and tort law. Colford's cross-appeal presented the issue of whether the trial court's entry of a judgment as a matter of law on his intentional infliction of emotional distress claim was erroneous. After considering all of the evidence Colford offered of Chubb's alleged tortious acts, the Law Court affirmed this judgment finding it "without error and within [the trial court's] discretion." *Colford*, 687 A.2d at 617. As quoted above, the Law Court found that Chubb's allegedly tortious acts did not rise to "the level of extreme and outrageous, or exceed all possible bounds of decency" so as to be actionable as a matter of Maine common law. *Id.*

The Law Court is undisputably the final arbiter both of Maine tort law generally and of what conduct is "so outrageous and extreme" as to be actionable under the tort of intentional infliction of emotional distress under Maine law specifically. *See West v. American Tele. & Tele. Co.*, 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law. . . . "). Colford concedes as much in his Petition. Petition 11.

II. The "Inadequate State Ground" Exception Provides No Basis To The Court To Review This State Law Decision.

To overcome the obvious shortcoming that this case involves no federal claim, but rather is simply a matter of

Maine State law, Colford seeks refuge in the narrow "inadequate state ground" exception to the bar against reviewing State law decisions. Relying principally on the decision in *Howlett v. Rose*, 496 U.S. 356 (1990), Colford argues that the Law Court, out of confusion, ignorance or possibly worse motives, improperly avoided the "complex calibration of remittitur" required by *BMW of North America, Inc. v. Gore*, 517 U.S. ___, 134 L.Ed. 2d 809 (1996), by deciding this case on an inadequate state law ground. Petition 11-12. Colford asserts that the Law Court's judgment that Colford failed to prove his intentional infliction of emotional distress claim lacked "substantial support in Maine law." Petition 9. For the following reasons, this argument is wrong and does not provide the basis for a writ of certiorari.

A. The *Howlett* line of cases provides no basis for jurisdiction.

1. The *Howlett* line of cases involves the use of state law to defeat the assertion of a federal right.

The *Howlett* decision and the other "inadequate state ground" cases cited by Colford provide no basis for jurisdiction and are distinguishable on their face. *Howlett* and its predecessors were all cases in which a state law decision prevented the assertion of a federal right by the party seeking review of the state law decision – a factor not present here. In *Howlett*, for example, the plaintiff asserted a section 1983 claim based on alleged violations of his rights under the Fourth and Fourteenth Amendments against illegal searches. The Florida state courts dismissed this federal claim on the grounds that Florida's

statutory waiver of sovereign immunity did not apply to section 1983 claims brought in Florida state court. This Court granted certiorari out of "concern that the state court may be evading federal law and discriminating against federal causes of action." *Id.* at 366. The necessary predicate to establishing "inadequate state ground" jurisdiction, thus, is demonstrating that the state ground has been used to prevent the party asserting a federal right from doing so. *Id.* at 366-67 & n.14 ("The reasons for [this] rule rest on nothing less than this Court's ultimate authority to review state-court decisions in which 'any title, right, privilege, or immunity is specially set up or claimed under the Constitution.'") (quoting 28 U.S.C. § 1257(a)). *See also* Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043, 1052 (1977) (In cases where "the existence or the application of a *federal right* turns on a logically antecedent finding on a matter of state law, it is essential to the Court's performance of its function that it exercise an ancillary jurisdiction to consider the state question.") (emphasis added); Alfred Hill, *The Inadequate State Ground*, 65 Columbia L. Rev. 943, 998 (1965) (state ground reviewable only when it directly violates federal law or "stands in the way of an independent federal claim"). Colford concedes as much in his Petition. *See* Petition 13-14 (The inadequate state law exception "is narrow because it comprises only cases that present a federal claim whose existence or application turns on a question of State law.").

2. In *See*king punitive damages, Colford asserted no federal right.

Colford's claim for punitive damages was not a federal claim. His right to the remedy of punitive damages is a matter of state tort law. *See Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). There is no federal Constitutional or statutory right to receive punitive damages in an action based on state tort law. It is perfectly within the right and authority of the Maine legislature and judiciary to do away with punitive damages in their entirety if they so choose, as at least one other state has done. *See* N.H. Rev. Stat. Ann. § 507:16 (1994) (prohibiting punitive damages altogether, unless explicitly provided by statute); *see also BMW*, 134 L.Ed. 2d at 822 (indicating that those states that "authorize exemplary damages" "have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases.").

The assertion of a right under the Due Process Clause of the Fourteenth Amendment comes into play with respect to punitive damages only from the defendant's point of view. The Due Process Clause provides the defendant against whom the punitive damages award has been entered protection from a "grossly excessive" penalty. *BMW*, 134 L.Ed. 2d at 818. As one of its arguments against the punitive damages award, Chubb raised this constitutional limitation. Neither the trial court in the post-trial phase nor the Law Court on appeal, however, had to consider this alternative, federal defense because the underlying intentional infliction claim failed as a matter of law.

That this potential Constitutional law defense existed for Chubb does not create a Constitutional right in Colford. Nor does the fact that the Law Court did not have to address this defense because Colford's claim failed as a matter of law provide a compelling reason for the Court to grant certiorari here. Taken to its logical conclusion, Colford's argument would suggest that in every case in which a party has a potential Constitutional defense, including every case in which punitive damages are sought, this Court would have jurisdiction to review all defense verdicts, regardless of whether the Constitutional defense played any role in the decision.

B. The Maine Law Court's decision is fairly and substantially supported by existing Maine precedent.

In any event, even if the *Howlett* line of cases did apply to this case on account of the mere existence of Chubb's Due Process defense to the punitive damages award, the Law Court's decision has more than adequate support in the factual record and under its intentional infliction of emotional distress precedent. Colford summarizes several of the Law Court's intentional infliction cases to suggest that its decision here is without support. Colford's summary shows that the "extreme and outrageous" standard for conduct to be actionable in tort in Maine is very high. The summary also shows that the Law Court has developed a body of law demarcating the line between what conduct is sufficiently outrageous to be actionable and what conduct is not. Great deference, accordingly, must be shown to the Law Court which

made this public policy determination on behalf of the State of Maine.

Colford's summary also highlights the importance of the trial court's role in determining whether particular conduct is sufficiently outrageous to be actionable. Maine law is clear that the determination in the first instance of whether conduct is sufficiently outrageous is a legal issue for the trial court. *Rubin v. Matthews Int'l Corp.*, 503 A.2d 694, 699 (Me. 1986). The trial court, which actually sees the witnesses and hears the evidence firsthand, is uniquely qualified to make this threshold determination.

Here, the trial court after carefully considering all of the evidence presented supporting Colford's tort claim concluded that Chubb's conduct did not rise to the level of conduct actionable for the infliction of emotional distress. A. 23a. The Law Court then considered this case, in the light of its developed case law on what conduct is sufficiently outrageous so as to be actionable, and concluded that Chubb's conduct did not reach that line.

We submit that the factual record and the Law Court's precedent fairly and substantially support this conclusion. Chubb's conduct fairly can be viewed to not have been so "extreme and outrageous" as to be actionable in light of the Law Court's other rulings in intentional infliction cases. This is particularly so in light of the fact that all of the acts about which Colford complains were done by Chubb to exercise contractual rights or to defend itself in this litigation. *See Chiapetta v. Lumbermens Mutual Ins. Co.*, 583 A.2d 198, 201 (Me. 1990) (finding that insurer's "assertions of its policy defenses in a legally permissible way does not render it liable for emotional

distress"). And, Colford oddly seems to agree: As part of his summary, Colford describes the decision in *Gray v. State of Maine*, 624 A.2d 479 (Me. 1993), as "probably the closest case" to the present, even though the Law Court there ruled that a human services caseworker's neglect and misrepresentations in a child protection investigation, which resulted in the plaintiff's son being removed from the plaintiff's care, "was not such extreme and outrageous conduct as to warrant a recovery. . . . " *Id.* at 484.

C. It is the recommended practice in Maine for trial courts in close cases to allow the case to go to the jury and then if the verdict is not supported by sufficient evidence to enter judgment as a matter of law.

Because the trial court originally ruled that sufficient evidence had been presented to warrant submitting the tort claim to the jury, Colford argues repeatedly that the trial court's post-verdict reversal of the judgment was without substantial support. Petition 3, 10 & 15. Maine trial courts, however, routinely reserve judgment on the legal sufficiency of the evidence until after a verdict is returned, thereby avoiding any need for a retrial if the legal determination is later reversed. *See Currier v. Toys 'R' Us, Inc.*, 680 A.2d 453, 455 (Me. 1996); *Bedard v. Pellon*, 606 A.2d 205, 207 (Me. 1992); *Reed v. Rule*, 376 A.2d 445 (Me. 1977); *Moore v. Fenton*, 289 A.2d 698, 700 n.1 (Me. 1972). "[T]he denial of a motion for a judgment as a matter of law and the subsequent grant of a judgment notwithstanding the verdict does not reveal confusion or

waffling on the part of the trial court but, rather, demonstrates a wise use of judicial resources." *Colford*, 681 A.2d at 616 n.11.

III. Colford's Petition Is Based On Several Mischaracterizations And Omissions Of The Record.

In his Petition, Colford mischaracterizes, and in some instances omits, pertinent parts of the record in several important respects. Chubb points out these misstatements to comply with Supreme Court Rule 15(2) and as further support for why the Court should deny Colford's Petition.

First, Colford asserts that by sending Chubb one month's premium prepayment with his application for disability coverage and submitting to a medical examination, he became eligible for temporary insurance coverage under a binder. Petition 4. This is misleading. Colford did not become eligible for temporary insurance simply by making his first premium payment and by submitting to a medical exam. Rather, as the Law Court held, Colford only would have been entitled to temporary insurance under the conditional receipt if he had satisfied the conditions precedent contained therein. *Colford*, 687 A.2d at 615. Because he did not satisfy those objective conditions, he was not entitled to temporary insurance. *Id.* "The fact that the advance premium paid was sufficient and did not constitute the reason why Colford was not acceptable does not convert the conditional receipt into temporary insurance without regard to the conditions." *Id.*

Second, Colford asserts that Chubb's underwriter was aware of Colford's pending claim and that this information influenced its decision not to insure Colford. Petition 5. As set forth in detail in the Statement of the Case above, this assertion is not supported in the record. Colford executed the conditional receipt on April 21, 1991. He injured his back less than two weeks later. Colford did not provide notice of his injury to Chubb until June 4, 1991. During the interim, completely unaware of Colford's injury, Chubb's underwriter determined that Colford did not satisfy the conditions of the conditional receipt and correspondingly on May 20, 1991 sent Colford a letter offering disability coverage with a different scope for which Colford would qualify.

Third, Colford asserts that he showed that Chubb Securities Corp. falsely informed the SEC that Colford wished to voluntarily terminate his registration as a licensed securities broker. Petition 5. Later in his Petition, Colford goes further and improperly attributes these statements to Chubb. Petition 10, 17. In his summary of the Law Court's discussion of his intentional infliction claim, Colford also insinuates that the Law Court itself found Chubb to have made false statements. Petition 10. The record does not support these assertions. The Law Court did not label Chubb's conduct with respect to the SEC as "false." *Colford*, 687 A.2d at 617. And, there is no evidence in the record to attribute to Chubb the conduct of Chubb Securities, a separate corporation.

Fourth, while he makes repeated reference to the physical symptoms he attributes to Chubb's conduct, *see* Petition 6, 18, Colford omits any reference to the fact that

he and his attorney during trial attributed these symptoms to Chubb's failure to pay disability benefits, not Chubb's other alleged conduct. Maine law is clear that there is no tort for the bad faith failure to pay insurance benefits, which would allow for the recovery of physical and emotional distress damages. *Marquis v. Farm Family Mutual Ins. Co.*, 628 A.2d 644, 652 (Me. 1993). Because there is no tort of bad faith, the Law Court required Colford to demonstrate that Chubb's purportedly tortious "actions arose independently of its denial of the disability claim." *Colford*, 687 A.2d at 617.

CONCLUSION

For the foregoing reasons, the Court should deny Colford's Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM J. KAYATTA, JR.
(*Counsel of Record*)
JARED S. DES ROSIERS
PIERCE ATWOOD
One Monument Square
Portland, ME 04101
(207) 791-1100

Attorneys for Respondent Chubb Life Insurance Company of America

Supreme Court, U.S.
FILED
MAY 19 1997
OFFICE OF THE CLERK

(3)

No. 96-1589

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CARROLL W. COLFORD,
Petitioner,

v.

CHUBB LIFE INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition For Writ of Certiorari To The Maine Supreme Judicial Court

REPLY BRIEF FOR PETITIONER

RONALD D. MAINES
(*Counsel of Record*)
R. SHAWN GUNNARSON
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

13 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. *Federal jurisdiction* 2

2. *Other Matters* 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

BMW v. Gore, 116 S.Ct. 1589 (1996) ..... *passim*

Gray v. State of Maine, 624 A.2d 479 (Me. 1993) 8, 9, 10

Heath v. Alabama, 474 U.S. 82 (1985) 2

Honda Motor Co. v. Oberg, 114 S.Ct. 2331 (1994) 3

Howlett v. Rose, 496 U.S. 356 (1990) 4

Michigan v. Long, 463 U.S. 1032 (1983) 4

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 3

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) .. 3

Street v. New York, 394 U.S. 576 (1969) 2

Terre Haute & Indianapolis R.R. Co. v. Indiana ex rel. Ketcham, 194 U.S. 579 (1904) 4

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 3

Yee v. Escondido, 503 U.S. 519 (1992) 2

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1254(1) 7

28 U.S.C. § 1257(a) 3, 7

U.S. CONST. amend. XIV, § 1 . . . . . *passim*

ARGUMENT

This case raises a substantial question about the discretion a State court possesses to interpret State law, when its interpretation avoids a claim asserted under the United States Constitution. May a State court rely on inadequate State grounds to avoid deciding whether a jury award of $24 million in punitive damages meets the constitutional standard articulated by this Court in *BMW v. Gore*, 116 S.Ct. 1589 (1996)?

Respondent Chubb Life Insurance Company of America (Chubb) refused to pay disability coverage to Petitioner Carroll W. Colford (Colford), one of its general agents, who permanently injured his back when he fell down some stairs. At trial the jury returned a unanimous verdict on all counts and awarded Colford $24,002,000 in punitive damages on a claim for intentional infliction of emotional distress. Despite such overwhelming jury support for Colford's case, and despite the court's earlier denial of Chubb's motion for directed verdict, the trial court granted judgment as a matter of law for Chubb on Colford's claim for intentional infliction of emotional distress. The state supreme court affirmed. Since Maine law requires proof of liability in tort as a predicate for receiving punitive damages, this judgment took away from Colford the entire award for punitive damages.

The Question Presented asks this Court to decide whether the judgment of the Maine supreme court rests on inadequate State grounds. In the proceedings before the Maine supreme court, both parties briefed whether the punitive damages award violates the Fourteenth Amendment Due Process Clause. The court skirted that substantial federal question by deciding that no reasonable jury could find Chubb liable to Colford for intentional infliction of emotional distress.

According to settled precedent, this Court has jurisdiction to decide whether the asserted grounds of that judgment under Maine law are adequate to avoid the substantial federal question under the Due Process Clause. If left uncorrected, the judgment in this case would mean, in effect, that State courts may evade the difficult work of bringing punitive damage awards into compliance with the due process standard articulated in *BMW v. Gore*, 116 S.Ct. 1589 (1996), by handing down anomalous decisions only superficially based on State law.

Chubb advances several reasons for denying review. None of them is persuasive.

1. *Federal jurisdiction.* Chubb contends on two grounds that the Court lacks jurisdiction to review the judgment of the Maine supreme court in this case. First, it argues that the opinion of the court contains "no issue of federal statutory or Constitutional law." Br. Opp. at 7. Second, it argues that the "independent and adequate state ground" doctrine furnishes no basis for the Court's jurisdiction. *See* Br. Opp. 8-14. On both points Chubb is mistaken.

A. With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533 (1992), the Court exercises jurisdiction under 28 U.S.C. § 1257(a) only if a petitioner's federal claim was expressly addressed by the State court or properly presented for its review. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985). If the opinion of the State court does not expressly address the federal claim, the petitioner bears the burden of proving that the claim was nonetheless properly presented. *See Street v. New York*, 394 U.S. 576, 582 (1969). To meet that burden the petitioner must show that his federal claim was

"brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Thus, whether the State court opinion contains citations to federal statutory or constitutional provisions is not the sole touchstone of jurisdiction under 28 U.S.C. § 1257(a). Jurisdiction lies with the Court so long as the petitioner can show that the federal claim was presented below "with fair precision and in due time." *Id.* Colford can make that showing in this case.

In his reply brief before the Maine supreme court, Colford raised a substantial federal question under the Fourteenth Amendment Due Process Clause. Chubb claimed in its reply brief that the $24 million punitive damage award exceeded the due process limits laid down by the Court in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corporation v. Alliance Resources Corporation*, 509 U.S. 443 (1993), and *Honda Motor Company v. Oberg*, 114 S.Ct. 2331 (1994). *See* Chubb Rep. Br. at 30-32.[1] Colford responded with a constitutional claim of his own, namely that the Fourteenth Amendment Due Process Clause does not prohibit the State of Maine from imposing $24,002,000 in punitive damages, given the egregious facts of this case. Colford Rep. Br. at 11-13. Colford's claim was not only constitutionally precise—he noted the correct constitutional provision and the kind of constitutional

---

[1]Chubb's reply brief nowhere mentions *BMW v. Gore*, 116 S.Ct. 1589 (1996) because the brief was filed on March 20, 1996, and the Court handed down its opinion in *BMW* two months later, on May 20, 1996. Furthermore, since the Maine supreme court did not address the constitutional issue in its opinion, neither party had occasion to cite the *BMW* opinion after it was released. If the Court were to grant review, however, *BMW* would obviously apply as controlling precedent.

protection he sought—but timely. Colford raised the claim at the earliest opportunity, since the nature of the claim requires a trial court judgment as a predicate, and he briefed the due process claim before the first appellate court to review that judgment. Contrary to Chubb's assertions, Colford's constitutional question was thus properly raised.

B. Chubb's second objection to the Court's jurisdiction rests on a misunderstanding of the adequate and independent state grounds doctrine.

In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court held that it would presume jurisdiction to review a state court decision if the judgment under review lacked "a plain statement that [it] rested on an adequate and independent state ground." *Id.* at 1044. Because the independence of the state ground of decision is not in question here, Colford's jurisdictional argument focuses on whether the Maine supreme court's state law ground of decision is *adequate*.

The principle that the Court has jurisdiction to decide whether a State court judgment rests on adequate State grounds is well-established. "The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review *de novo*." *Howlett v. Rose*, 496 U.S. 356, 366 (1990). Such review serves the vital purpose of ensuring State court fidelity to the Supremacy Clause. *See id.* at 366-67 n.14. For without jurisdiction to determine whether a purported State law ground of decision is adequate, a State court could refuse to vindicate a federal claim and then defeat the Court's jurisdiction through the "easy method," *Terre Haute & Indianapolis R.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S.

579, 589 (1904) (Holmes, J.), of resting judgment on superficially authoritative (but in fact, inadequate) State law grounds. It is precisely that state of affairs which occurred below. Thus, contrary to Chubb's objections, this case qualifies as an instance where the Court's jurisdiction under the "inadequate state ground" doctrine is appropriate.

Chubb also argues that Colford has made no valid constitutional claim. *See* Br. Opp. at 11-12. It draws this conclusion based on two reasons: federal law does not entitle Colford to punitive damages, *per se*, and Chubb's *BMW* claim is only a "potential Constitutional law defense." *Id.* at 12. Neither reason withstands scrutiny.

Chubb urges that Colford is entitled to punitive damages only as a matter of State law. As Chubb puts it, "There is no federal Constitutional or statutory right to receive punitive damages in an action based on state tort law." Br. Opp. at 11. This statement is true but irrelevant. Colford nowhere argues in his petition that federal law entitles him to punitive damages. Chubb's point that Maine could "do away with punitive damages in their entirety if they so choose," *id.*, is likewise irrelevant since Maine's discretion to eliminate punitive damages as a remedy for intentional infliction of emotional distress is not at issue.

Chubb further argues that Colford cannot rely for jurisdiction on "the mere existence of Chubb's Due Process defense to the punitive damages award." Br. Opp. at 12. This argument fails for two reasons. First, Chubb's "Due Process defense" is in reality a *claim*, namely, the claim that the Due Process Clause prohibits the State of Maine from imposing $24 million in punitive damages against Chubb, presumably on

the ground that the award is "grossly excessive" as that term has been defined by the Court. Second, if by "mere existence" Chubb means to suggest that its due process claim is somehow dormant, it is simply mistaken. Chubb in fact asserted this claim, and Colford answered it. Colford's answer—the $24 million jury award in punitive damages is *not* "grossly excessive," so as to be prohibited by the Due Process Clause—poses a constitutional question that Chubb may not merely wish away.

As a final attempt to persuade the Court to deny jurisdiction, Chubb draws the following implication from Colford's petition.

> Taken to its logical conclusion, Colford's argument would suggest that in every case in which a party has a potential Constitutional defense, including every case in which punitive damages are sought, this Court would have jurisdiction to review all defense verdicts, regardless of whether the Constitutional defense played any role in the decision.

Br. Opp. at 12. This suggestion is chimerical, as it depends for its force on a misreading of Colford's argument. Read correctly, his argument means only that a party who actually asserts a defense to a federal constitutional claim, *and whose defense is avoided on inadequate state grounds*, may invoke jurisdiction in this Court. With these qualifications, Colford's jurisdictional argument does not embrace "every [State court] case in which a party has a potential Constitutional defense." It merely applies established precedent to justify review in a case where the Court's constitutionalization of punitive damages makes such review implicitly available.

In sum, Chubb's jurisdictional objections are ill-founded. This case presents a substantial federal question that Colford properly raised in the courts below.

2. *Other Matters.* Chubb notes that Colford cited 28 U.S.C. § 1254(1), when he intended to cite 28 U.S.C. § 1257(a) as the basis for the Court's jurisdiction. Br. Opp. at 7. We apologize for this clerical error. Chubb's Brief in Opposition is marred by several errors of its own, two of which, in particular, require correction.

A. In its statement of the case, Chubb describes Colford's injury in the following terms:

> Colford reported to a doctor that he had fallen down a flight of stairs on April 30, 1991 and injured his back. While a series of subsequent exams by neurologists showed that Colford was *completely normal from a neurological standpoint*, he *nevertheless* continued to report pain involving his cervical and lumbar spine.

Br. Opp. at 2 (emphasis added). This passage suggests that Colford's injury and its resulting pain is imaginary—at least "from a neurological standpoint"—and that, at worst, Colford has been falsely reporting back pain to get money from Chubb. As the record shows, nothing could be further from the truth.

Two neurosurgeons examined Colford. Dr. Doolittle concluded that Colford's injuries were "not amenable to surgery," App. II, vol. 3, at 487, and recommended a course of non-surgical treatment instead. Even Dr. Ciembroniewicz, the neurosurgeon who examined Colford on behalf of Chubb, admitted that Colford suffered from "a *severe*

musculoligamentous injury." *Id.* at 491 (emphasis added). Dr. Harrison Aldrich, Colford's personal physician, concluded upon examination that Colford suffered from severe pain from torn tendons, herniated discs, and muscle damage in his cervical and lumbar region. App. II, vol. 3, at 461, 462, 468, 560. Moreover, Colford's injuries were assessed as permanently disabling by the Social Security Administration of the United States, App. II, vol. 3, at 300, and the State of Maine, Worker's Compensation Commission, App. II, vol. 6, at 1845, 1856.

B. Chubb contends that its conduct in this case was not "extreme and outrageous," as that phrase has been interpreted under Maine law. Br. Opp. at 13-14. Toward the end of this argument Chubb remarks that "Colford oddly seems to agree." *Id.* at 14. Chubb claims to locate support for this astonishing proposition—Colford *agrees* with Chubb that it is not liable for intentional infliction of emotional distress—in Colford's petition itself.

> As part of his summary, Colford describes the decision in *Gray v. State of Maine*, 624 A.2d 479 (Me. 1993), as "probably the closest case" to the present, even though the Law Court there ruled that a human services caseworker's neglect and misrepresentations in a child protection investigation, which resulted in the plaintiff's son being removed from the plaintiff's care, "was not such extreme and outrageous conduct as to warrant a recovery . . . ." *Id.* at 484.

Chubb has quoted the phrase "probably the closest case" out of context.

One of the key arguments in Colford's petition is that the Maine supreme court's judgment, which affirmed the trial court's grant of judgment as a matter of law against Colford's claim for intentional infliction of emotional distress, rests on inadequate State grounds. Pet. at 16-19. To substantiate this point, Colford summarized several intentional infliction of emotional distress cases decided under Maine law. *Id.* at 17-19. The summary divided the cases into two categories. In one category the court held that the defendant's conduct met the "extreme and outrageous" standard necessary to prove liability for intentional infliction of emotional distress. In the other category the court held that the defendant's conduct failed to meet that standard.

Toward the end of the paragraph of the petition that summarizes the "no liability" category of cases, the following passage appears:

> Finally, in what is probably the closest case, in light of competent evidence on which the state based its decisions, a human services caseworker's neglect or refusal to interview available professionals with exculpatory explanations for the child's symptoms and the caseworker's misrepresentation of the opinions of two social workers to buttress his own suspicions, was held to be insufficiently extreme and outrageous to warrant recovery from the state. *Gray v. State of Maine*, 624 A.2d 479 (Me. 1993). The egregiousness of Chubb's repeated misconduct, and its physical effects on Colford—he vomited blood, acquired ulcers, suffered nausea, and lost sleep out of anxiety over Chubb's actions—exceed even these troubling facts.

Br. Opp. at 19. As the context makes plain, "probably the closest case" does *not* mean "probably the closest case to the case at bar." It rather means that *Gray* is an illustrative case closest to the line separating liability from non-liability, but nevertheless *not* problematic to Colford's analysis because Chubb's conduct was more egregious than the conduct exhibited by the defendant in *Gray*. Chubb claims that its conduct is not outrageous and reads the above passage to mean that "Colford oddly seems to agree." Br. Opp. 14. On the contrary. Colford does *not* agree—oddly or otherwise.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Ronald D. Maines
(*Counsel of Record*)
R. Shawn Gunnarson
MAINES & LOEB, PLLC
2300 M Street, N.W., Suite 900
Washington, D.C. 20037
(202) 223-2817

May 19, 1997